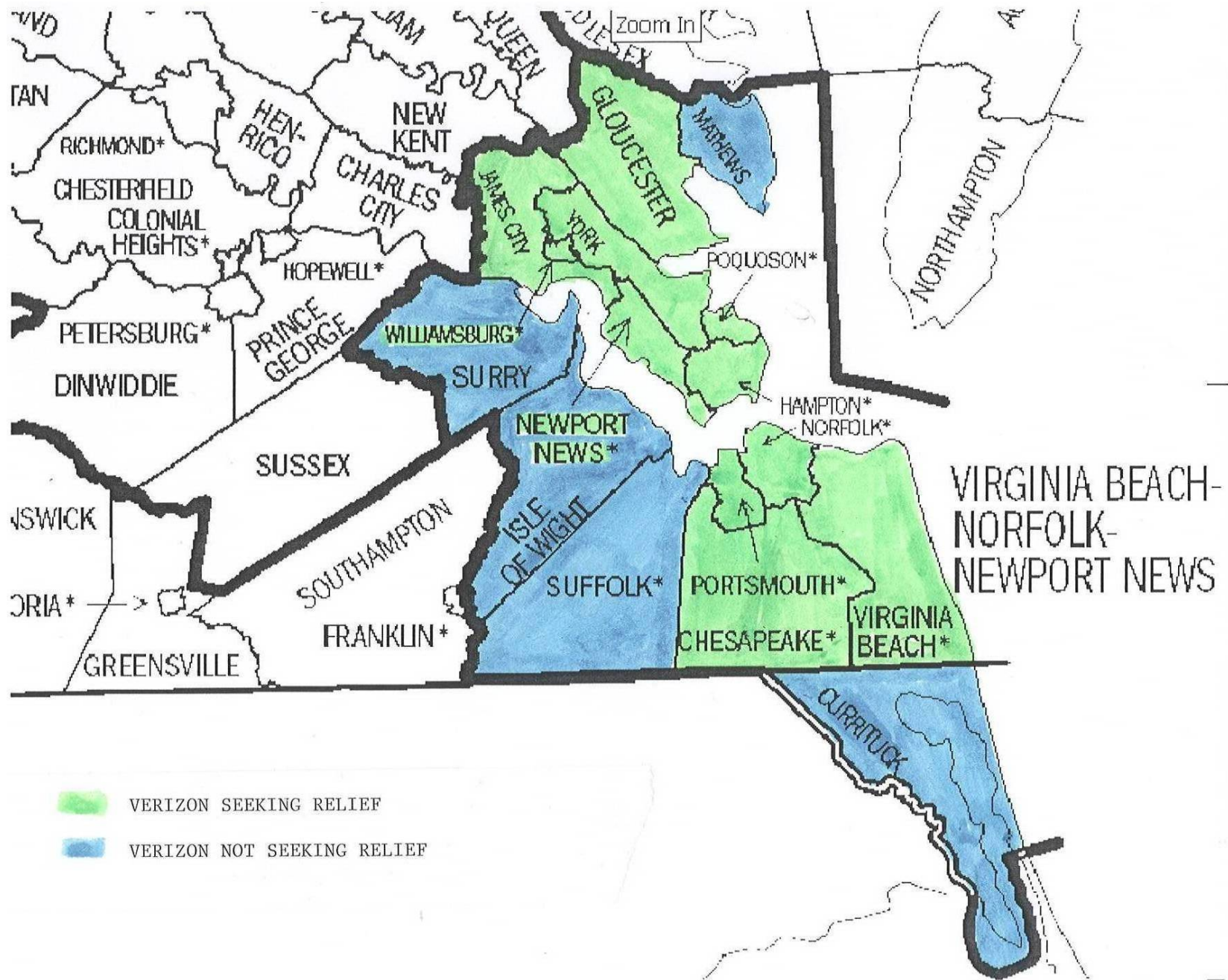


ATTACHMENT A



ATTACHMENT B

Properly Estimating the Size of the Wireless-Only Market

The Federal Communications Commission (“FCC”) has recently discussed estimates of “wireless-only” subscribers¹ when calculating the residential market share of incumbent local exchange carriers (“ILECs”) as part of its Section 10 forbearance analysis.² The potential inclusion of a wireless-only estimate in the FCC’s market share calculation places increased importance on a critical examination as to *what* data measuring wireless-only penetration is most reliable and *how* that data should be interpreted.

This report recommends that any estimate of wireless-only subscribers used in a forbearance analysis satisfy four requirements:³

- * The estimate should be developed from the best-available data collected by a neutral party. Data from the semi-annual National Health Interview Survey released by the Centers for Disease Control best satisfies this criterion (“CDC Survey”) at this time.
- * The estimate should reflect regional differences in wireless acceptance.⁴
- * Given the critical importance of the forbearance analysis, the FCC should not rely on the CDC Survey’s point-estimate of wireless-only households, but should instead use the lower bound of the 95% confidence interval. By relying on the lower bound of this interval estimate, the FCC will better protect against the risk that it

¹ The FCC refers to these customers as “cut-the-cord” wireless subscribers.

² See Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172, Memorandum Opinion and Order (rel. Dec. 5, 2007) (“*Verizon Six-MSA Order*”).

³ By recommending these criteria, this report does not endorse the FCC including wireless service in its forbearance analysis. Including *wireless* lines in a *wireline* forbearance analysis assumes a degree of substitutability between such services at odds with the facts and the FCC’s own conclusions in other contexts. Consequently, the recommendations of this report focus on criteria that should be applied to the development of a wireless-only estimate *assuming* (without endorsement) that the FCC’s analytical framework might include wireless-only lines.

⁴ The CDC Survey separately reports estimates of wireless-only households for each of the four geographic regions used by the Census Bureau: Northeast, Midwest, South, and West.

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is adopting an inflated estimate of the actual number of wireless-only subscribers.

- * The estimate should exclude identifiable groups that, because of factors unique to each of those groups, can be expected to exhibit wireless preferences that are not representative of the population as a whole. Specifically, college-age respondents should be excluded from the calculation.

A further discussion of these four criteria – as well as a wireless-only share based on the most recent CDC Survey that complies with these criteria – is provided below.

The Use of Wireless-Only Estimates in Forbearance Analysis

The FCC first included discussion concerning the potential inclusion of wireless-only lines in the calculation of an incumbent's market share in the *Verizon Six-MSA Order*.⁵ Although the FCC incorporated an estimate of wireless-only customers in determining Verizon's residential market share, the Commission has otherwise expressed skepticism that wireless services are true substitutes for wireline local exchange service. Most recently, the FCC expressly abandoned its earlier prediction that wireless services would become substitutes to wireline service, explaining:

[We] did not foresee that competitive ETCs might offer supported services that were not viewed by consumers as substitutes for the incumbent LEC's supported services.... Thus, rather than providing a complete substitute for traditional wireline service, these wireless competitive ETCs largely provide mobile wireless telephony service in addition to a customer's existing wireline service.

Because the majority of households do not view wireline and wireless services to be direct substitutes, many households subscribe to both services ...⁶

The FCC's skepticism that wireless service will *replace* wireline service – as contrasted with being purchased in *addition* to wireline service – is well founded.

⁵ Although the FCC has used estimates of "cut-the-cord wireless substitution" in other contexts (see *Verizon Six-MSA Order*, at ¶ 27, n. 89), the *Verizon Six-MSA* analysis was the first time that the Commission discussed possibly using such information when judging whether forbearance was appropriate.

⁶ *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, WC Docket Nos. 05-337 and 96-45, (rel. Jan. 29, 2008) ("*Identical Support NPRM*"), at ¶¶ 9-10. See also *id.*, at ¶ 12 ("... the majority of competitive ETCs [which are wireless] generally do not sell services that consumers view as direct substitutes for wireline services.").

Properly Estimating the Size of the Wireless-Only Market March 2008

According to CTIA,⁷ the number of wireless subscribers (243 million) is rapidly approaching the total population of the United States above the age of 9 (estimated at 256 million).⁸ If wireless service was replacing wireline service in the manner that the FCC once predicted, wireline service would already have virtually disappeared.

Nevertheless, there is evidence that some consumers rely exclusively on wireless service and, to the extent that the FCC evaluates forbearance requests applying market share calculations that incorporate an estimate of wireless-only lines, it is important that number of wireless-only lines be estimated correctly.

The Minimum Criteria Applicable to a Wireless-Only Estimate

In the *Verizon Six-MSA Order*, the FCC estimated the cut-the-cord wireless population applying the nationwide point-estimate of the percentage of wireless-only households developed by the CDC.⁹ As an initial approximation of the number of wireless-only households, the FCC's reliance on the nationwide point estimate provided by the CDC Survey may not have been unreasonable, particularly within an order rejecting forbearance because of Verizon's failure to meet a number of thresholds.

Before approving any petition where an estimate of wireless-only subscribers is included in the analysis, a far more critical examination as to how a wireless-only estimate should be developed is needed. A minimum of four criteria are proposed below that any wireless-only estimate should satisfy before it should be considered for inclusion in a market share calculation.¹⁰

- (1) *The estimate should be developed from the best available data collected by a neutral third party.* The semi-annual National Health Interview Survey released by the Centers for Disease Control – which provided the source data relied upon in the *Verizon Six-MSA Order* – is the best currently available information,

⁷ Semi-Annual Wireless Industry Survey Results, CTIA-The Wireless Association, Estimate as of June 2007.

⁸ Estimated U.S. Population as of July 2007, U.S. Census Bureau, Dec. 27, 2007, adjusted by Age Distribution from 2000 Census (Source: CensusScope.Org).

⁹ *Verizon Six-MSA Order*, Appendix B, citing Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates Based on Data from the National Health Interview Survey, July-Dec. 2006* (rel. May 14, 2007) (“CDC May 2007 Survey”).

¹⁰ As indicated earlier, this report assumes that the FCC retains the basic framework to judge the appropriateness of a forbearance request described in Appendix B to the *Verizon Six-MSA Order*. This assumption, however, should not be interpreted as an endorsement of that framework. There are substantial problems with the methodology described in Appendix B, including that the methodology: (1) focuses exclusively on retail market conditions; (2) does not separately evaluate the residential and business product markets; and (3) would sanction the emergence of an unduly concentrated market by eliminating competition based on unbundled network elements (“UNEs”), largely in response to the success of a single cable-based provider of communications services.

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routinely developed, using valid survey techniques by a neutral party.¹¹ Although the most appropriate data *source* was used in *Verizon Six-MSA Order*, the specific metric adopted by that order – the nationwide point estimate – is not appropriate.

- (2) *Where data permits, the estimate should capture regional differences in wireless acceptance.* Importantly, the CDC Survey provides detail on wireless-only penetration at the regional level. Specifically, the CDC Survey provides separate estimates – and, as discussed in more detail below, confidence intervals – for each of the four geographic regions routinely used by the Census Bureau: Northeast, Midwest, South, and West.

Table 1: Comparing the Regional Wireless-Only Estimates to the National Average¹²

Region	Point Estimate	Confidence Interval
Northeast	8.8	7.10 -10.81
Midwest	14.0	12.35 -15.83
South	14.9	13.42 -16.40
West	10.9	9.54 -12.33
Nationwide	12.6	11.84-13.48



As the table at right demonstrates, there are substantial differences in the estimates of wireless-only households between regions. This is true whether the metric

¹¹ Indeed, the reason that the CDC collects information on wireless-only households is unrelated to the contentious economic and regulatory issues to which its data is often applied. Rather, the CDC's National Center for Health Statistics (NCHS) monitors a variety of health-related attributes of the population. As explained by the CDC:

Most major survey organizations, including the NCHS, do not include wireless telephone numbers when conducting random-digit-dial telephone surveys. Therefore, the inability to reach households with only wireless telephones (or with no telephone service) has potential implications for results from health surveys, political polls, and other research conducted using random-digit-dial telephone surveys. Coverage bias may exist if there are differences between persons with and without landline telephones for the substantive variables of interest.

Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates Based on Data from the National Health Interview Survey, Dec.-July 2007* (rel. Dec. 10, 2007) ("CDC December 2007 Survey").

¹² The CDC Survey publishes *regional* wireless-only penetration as a percentage of adults. The CDC separately provides a slightly higher *nationwide* estimate of wireless-only penetration calculated as a percentage of households (13.6% for the period shown in Table 1). To maintain consistency with the published results of the CDC Survey, this report analyzes wireless-only penetration as a percentage of responding adults.

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is a point estimate or confidence interval. As such, the FCC should use the applicable regional estimate in its analysis, rather than the nationwide average.

- (3) *The FCC should base its analysis on the lower bound of the 95% confidence interval and not the point estimate for each region.* The CDC Survey, like all surveys, employs a sample to estimate a population average. Because all sample means are likely to deviate from the actual population mean to some extent, confidence intervals are frequently used to encompass the *range* of values within which the actual mean is likely to reside.¹³

The importance of the confidence interval – in comparison to the point estimate – is illustrated by comparing the CDC Survey results from June-December 2006 to the more recent January-June 2007 Survey. Focusing exclusively on the point estimate could lead one to conclude that the percentage of wireless-only households continues to grow throughout the nation, with the point estimates increasing for each region.

Table 2: Comparison of CDC Surveys

Census Region	CDC Survey June-Dec. 2006			CDC Survey Jan.-June 2007		
	Point Est.	95% Conf. Interval		Point Est.	95% Conf. Interval	
		Lower	Upper		Lower	Upper
Northeast	8.6	6.5	11.2	8.8	7.1	10.8
Midwest	11.4	9.9	13.1	14.0	12.4	15.8
South	14.0	12.2	16.0	14.9	13.4	16.4
West	11.0	9.3	13.0	10.9	9.5	12.3

Expanding the comparison to include an analysis of the confidence intervals from each survey, however, supports a different conclusion. In three of the four regions (that is, all regions except the Midwest), the point estimate from the more recent survey (Jan.-June 2007) falls *within* the confidence interval of the prior survey, suggesting that the more recent estimate may simply be a different estimate for the same underlying population. Moreover, for two of the regions, the entire confidence interval for the Jan-June 2007 survey falls within the confidence interval of the prior (June-December 2007) survey, suggesting that the later survey may enjoy greater *precision* in its estimate, but not necessarily a statistically different *value*.

The point of this discussion is that the Commission could easily misinterpret the CDC Survey if it bases its analysis on the point estimate for the

¹³ Generally speaking, a 95% confidence interval means that if an average were calculated on multiple samples, the calculated confidence interval (which would differ for each sample) would encompass the true population parameter 95% of the time. For the purpose used here, it is reasonable to compare the 95% confidence interval to the “margin of error” commonly used in polling. In lay terms, a 95% confidence interval means that there is a 95% likelihood that the actual average is within the upper and lower bounds of the interval.

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number of wireless-only households.¹⁴ Given the potential importance of the wireless-only estimate – *i.e.*, the estimate could possibly lead the Commission to conclude that the elimination of an incumbent’s unbundling obligations is warranted – it is critical that the Commission have confidence in the value chosen.

Rather than use the point estimate from the CDC Survey, it is recommended that the Commission use the lower bound of the 95% confidence interval. The lower bound is appropriate because the harmful consequences of overestimating wireless-only penetration (and thereby prematurely granting forbearance) are greater than the potential harm in taking a more conservative approach.¹⁵ By relying on the lower bound of the interval estimate, the Commission can be highly confident that the actual level of wireless-only lines is at or above the value used in its analysis, while limiting any risk that it might reach differing conclusions regarding wireless-only penetration merely because two point estimates from different samples both fall within the same confidence interval.

- (4) *The FCC should exclude identifiable groups that are not representative of the population as a whole.* The CDC Survey unambiguously documents the fact that the highest concentration of wireless-only penetration is among the young. As the table at right shows, wireless-only behavior is most prevalent among college-age adults, where “roommates” are the most prevalent form of “household.”¹⁶

**Table 3: Age Distribution
of Wireless-Only Heads of
Household**

Age	Est. %
18-24	27.9
25-29	30.6
30-44	12.6
45-64	7.1
> 65	2.0

The college experience – with its unique purchasing patterns and behavioral choices – is not representative of the adult population as a whole. The CDC Survey reveals the disproportional influence of the college-age population on the overall profile of the wireless-only consumer, concluding that wireless-only households are more likely (than wireline households) to have engaged in binge drinking in the past year, to include smokers, and to have experienced serious psychological distress in the prior month.

¹⁴ In addition, the CDC warns that estimates based on less than a full year’s data exhibit large variances due to the relatively small sample sizes, and recommends caution in how such estimates are interpreted. *CDC December 2007 Survey*, at 2. This suggests that the FCC should rely only on estimates developed from a full year of survey data, and should not isolate its analysis on the most recent estimate from a half-year survey.

¹⁵ It is not the purpose of this analysis to debate the relative merits of forbearance but rather to identify the relative consequences of error – that is, the harm potentially caused by granting forbearance based on an *over*-estimate of market conditions, in comparison to the harm caused by denying forbearance because of a false *under*-estimate of those conditions.

¹⁶ The CDC Survey estimates that more than one-half of all adults living with unrelated roommates live in “households” with only wireless phones. *CDC December 2007 Survey*, at 2.

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To properly estimate the lasting effects of wireless-only pressures on the incumbent, the Commission should remove from its analysis the distorting influence of college-age wireless-only respondents. The unique qualities of wireless service make it the ideal communications solution for young adults.¹⁷ Matching the behavioral patterns of young adults, however, does not mean that wireless service is a meaningful economic substitute for more mature households, much less a viable offering to meet the communications needs of the nation's business community. To the extent that the FCC relies on estimates of wireless-only lines in its forbearance analysis, the Commission should first remove college-age respondents from the sample.¹⁸

Corrected Estimates of Wireless-Only Lines

The following table estimates the percentage of wireless-only adults, based on the data collected in the Jan.-June 2007 CDC Survey, but eliminating respondents in the 18-24 age group.¹⁹

Table 4: Corrected Estimate of Wireless-Only Penetration

Region	With College-Age	Without College-Age	Estimated 95% CI ²⁰		Corrected Estimate
			Lower	Upper	
Northeast	8.8%	6.8%	5.1%	8.8%	5.1%
Midwest	14.0%	9.6%	7.9%	11.4%	7.9%
South	14.9%	10.9%	9.4%	12.4%	9.4%
West	10.9%	7.4%	6.1%	8.9%	6.1%

As demonstrated by Table 4, the wireless-only household remains relatively rare, particularly when the analysis is limited to the adult households beyond college-age. This conclusion is reinforced by a recent review of confidential information concerning the number of wireline numbers ported to a wireless provider. The more subscribers perceive the services as substitutes, the more one would expect to see customers disconnecting their wireline service and porting their number to a wireless provider. The

¹⁷ Contemporary wireless services not only provide access to users away from their principal residence, the services support mobile text messaging, music-downloads, and customized ring-tones (not to mention video replay and game playing).

¹⁸ It also questionable whether college-age respondents should properly be considered “cut-the-cord” subscribers, as it is not clear whether such respondents would have subscribed to wireline service had they not had access to a wireless phone.

¹⁹ Although not routinely published, the wireless-only averages calculated after the removal of the 18-24 age group respondents were supplied by the CDC.

²⁰ The 95% Confidence Interval (“CI”) is constructed by applying the CI for each region published by the CDC to a revised mean calculated after the removal of the 18-24 age group.

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data reveals, however, that *very* few customers (less than 1%) have ported their wireline phone number to a wireless provider.²¹

The Telephia Survey Cited by Qwest is Unreliable

Although there may be disagreement as to how wireless-only data should be interpreted, most observers agree that the CDC Survey provides the most reliable data source available at this time to determine the number of wireless-only lines. For example, Qwest recommends use of the CDC Survey results generally,²² although it goes on to claim that a survey conducted by Telephia (and cited by the FCC in its most recent CMRS Competition Report) suggests that individual markets in the Qwest region are experiencing levels of wireless-only penetration that are greater than the national average.²³

To begin, the Telephia survey cited in the *Twelfth CMRS Report* is nothing more than an abbreviated press story that does not provide the level of statistical detail and objectivity of the CDC Survey. For this reason alone, the FCC should ignore the Telephia survey in its forbearance analysis.

More importantly, however, the press release announcing the survey cited by the *Twelfth CMRS Report* contains the following critical disclaimer:

Note: Wireless substitution rates were determined through an online survey of 700+ households for each metropolitan area. National Health Interview Survey (NHIS) data was used to adjust for off-line households. Differences in wireless penetration rates between cities may not be statistically significant.²⁴

²¹ See Pre-Filed Direct Testimony of Joseph Gillan on Behalf of Cox Virginia Telcom, Inc. (Revised), *Application of Verizon Virginia Inc. and Verizon South Inc. For a Determination that Retail Services Are Competitive and Deregulating and Detariffing of the Same*, Virginia Corporation Commission Case No. PUC-2007-00008, filed June 1, 2007, at 18. The wireline-to-wireless porting data also showed that, of the customers that have ported their wireline number to a wireless carrier, significantly more than half ported their number to Verizon Wireless, the affiliate of the incumbent local exchange carrier in Virginia.

²² See, e.g., Letter from Melissa Newman, Vice President, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Mar. 5, 2008), at 7 (recommending that the FCC use the CDC Survey nationwide estimate). As explained above, relying on the nationwide point estimate is likely to overstate the number of wireless-only lines in most states comprising the region served by Qwest.

²³ *Id.*, citing *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 07-71, Twelfth Report (rel. Feb. 4, 2008) (“*Twelfth CMRS Report*”), at ¶ 248.

²⁴ See Telephia Press Release, attached to Brigham/Teitzel Declaration – Denver MSA, WC Docket No. 07-97 (filed Apr. 27, 2007), at Exhibit 5, p. 3 (emphasis added).

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In other words, the claimed differences in wireless-only penetration rates announced by Telephia may have arisen simply due to random influences and may not accurately reveal true differences between the markets. While such imprecision may be reasonable for other purposes to which the Telephia survey may be put, the FCC should not risk basing a forbearance determination on claimed differences between markets that may be the result of random sampling or other factors.

Further, the claimed levels of wireless-only penetration in the Telephia survey are fundamentally inconsistent with the pattern of wireless penetration by Economic Area detailed by the *Twelfth CMRS Report*. Table A-3 of the *Twelfth CMRS Report* computes estimated wireless penetration rates for most major cities (organized as Economic Areas).²⁵ Importantly, the levels of wireless-only penetration claimed by Telephia fail to correlate with the levels of wireless penetration contained in the *Twelfth CMRS Report*, regardless of whether wireless penetration is measured as a percentage of the population or is measured in absolute lines.²⁶ The Telephia survey is not reliable as a geographic estimate of the number of wireless-only lines and should not be relied upon by the FCC in its forbearance analysis.

Conclusion

Granting Section 10 forbearance permanently affects local market conditions. As such, it is important that the Commission have confidence in its market analysis, including – to the extent that any wireless calculation is appropriate – the Commission’s estimate of wireless-only penetration. This report recommends four requirements that any estimate should satisfy before the estimate should be relied upon by the FCC in conducting its forbearance analysis. As additional data becomes available, further refinements in methodology may be appropriate; at this time, however, these requirements should be viewed as the minimum reforms needed before wireless-only data is considered in any wireline forbearance request.

²⁵ Economic Areas are collections of counties aggregated by the Bureau of Economic Analysis to report regional economic statistics. Each Economic Area consists of one or more Economic Nodes - metropolitan areas or similar areas that serve as centers of economic activity - and the surrounding counties that are economically related to the nodes. The main factor used in determining the economic relationships among counties is commuting patterns, so each Economic Area includes, as far as possible, the place of work and the place of residence of its labor force.

²⁶ Specifically, simple linear regressions between the Telephia estimate of wireless-only penetration (as the dependent variable) and wireless penetration (single independent variable), or wireless subscribers and EA population (two independent variables), failed to establish a statistically-significant relationship. While primitive, the absence of any relationship between the wireless-only estimate and the penetration of wireless more generally casts further doubt on the reliability of the Telephia survey, particularly with respect to an issue as important as forbearance.

ATTACHMENT C

REDACTED-FOR PUBLIC INSPECTION

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

)

)

Petitions of the Verizon Telephone Companies)
for Forbearance Pursuant to 47 U.S.C. § 160(c))
in the Boston, New York, Philadelphia,)
Pittsburgh, Providence and Virginia Beach)
Statistical Areas)

WC Docket No. 06-172

**OPPOSITION OF TIME WARNER TELECOM INC., CBeyond INC., AND ONE
COMMUNICATIONS CORP.**

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March 5, 2007

REDACTED-FOR PUBLIC INSPECTION

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**OPPOSITION OF TIME WARNER TELECOM INC., CBeyond INC., AND ONE
COMMUNICATIONS CORP.**

Time Warner Telecom Inc. (“TWTC”), Cbeyond Inc. (“Cbeyond”) and One
Communications Corp. (“One Communications”) (collectively, the “Joint Commenters”), by
their attorneys, hereby submit this opposition to six petitions for forbearance from unbundling
and other regulations filed by Verizon in the above referenced docket.¹ As discussed below, the
Joint Commenters oppose the Verizon petitions to the extent those petitions seek forbearance
from unbundling and other regulations governing access to Verizon local transmission facilities
needed to serve business customers.

¹ See *Pleading Cycle Established for Comments on Verizon’s Petitions for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Public Notice, WC Docket No. 06-172, DA 06-1869 (rel. Sept. 14, 2006).

I. INTRODUCTION AND SUMMARY.

In the *Triennial Review Order*² and *Triennial Review Remand Order*³, the FCC dramatically scaled back the incumbent LECs' unbundling obligations. Wherever possible, the FCC seized upon indications that it might be "possible" for either an intramodal or intermodal competitor to deploy a specific type of facility as a basis for eliminating unbundling for that facility. Even in the absence of such purported evidence, the FCC relied on the policy goals of Section 706 to eliminate unbundling for packetized and fiber-based loops. But the record left the Commission no choice but to conclude in the *TRRO* that multiple DS-1 and single DS-3 loops do not offer sufficient revenue opportunities to permit competitors to efficiently deploy such facilities in most areas of the country (those wire centers that do not meet the relevant impairment triggers). *See TRRO* ¶ 154. The FCC also had no choice but to conclude that DS-1 and DS-3 transport facilities do not offer sufficient revenue opportunities to allow competitors to efficiently deploy such facilities except along the routes that meet the relevant *TRRO* impairment triggers. *See id.* ¶¶ 126, 129. Even the D.C. Circuit, the same court that had flouted *Chevron* deference in two previous decisions to substitute its dislike of unbundling for the FCC's reasonable interpretations of Sections 251(c)(3) and 251(d)(2), upheld the *TRRO* as a permissible interpretation and application of unbundling provisions of the Communications Act.

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order*, 18 FCC Rcd 16978, ¶ 150 (2003), *subsequent history omitted* ("TRO").

³ *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533, ¶¶ 79-85 (2005) ("TRRO").

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While competitive carriers like the Joint Commenters had hoped that the D.C. Circuit's affirmance of the *TRRO* would finally yield some regulatory stability, this has not been the case. Beginning with the Qwest petition for Omaha, the subsequent ACS petition for Anchorage and continuing now with the instant Verizon petitions, the incumbent LECs have sought to end run the *TRRO* by seeking forbearance from the few unbundling obligations that remain after the *TRRO*. In reviewing the Qwest Omaha and ACS Anchorage forbearance petitions, the Commission has failed to apply a coherent analytical framework. Most importantly, in the *Omaha Order* and the *Anchorage Order*, the Commission (1) refused to conduct a separate analysis for each type of loop and transport facility subject to the forbearance request, even though it has repeatedly held that this is the appropriate methodology; (2) refused to utilize wire center geographic markets -- as it has repeatedly held are appropriate -- for analyzing unbundled loops where the available data did not support forbearance in particular wire centers; (3) relied on hopeful and baseless predictive judgments -- which have turned out to be wrong -- that the ILECs would have "very strong market incentives" to offer the local transmission facilities in question to competitors on terms and conditions that allow such competitors to compete efficiently even without access to UNEs; and (4) ignored the principle that facilities deployment by intermodal competitors with unique advantages is largely irrelevant to whether UNEs should be retained.

As a result of these methodological errors, the Commission has eliminated unbundling requirements for loop and transport facilities needed to serve businesses in Omaha and Anchorage based on competition from cable operators *in a different product market* -- the residential market. To the limited extent that the Commission has separately analyzed competition in the provision of loops and transport needed to serve businesses at all, it has

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refused to do so on a wire center-by-wire center basis, thus eliminating unbundling in some wire centers based on competition in *different geographic markets* -- other wire centers. It has also incorrectly concluded that a cable operator's offer of some services to business customers in a wire center, however limited by network reach or network technology, by itself gives the ILEC the incentive to offer non-cable competitors access to essential loop and transport facilities at prices that allow such intramodal competitors to efficiently serve the market.

In the *Omaha Order* and the *Anchorage Order*, the Commission eliminated unbundling requirements for DS-0, DS-1 and DS-3 loops as well as for DS-1 and DS-3 transport facilities in wire centers where the requirements of Section 10 had not been met. That is, retention of those unbundled elements was clearly necessary to ensure the "charges, practices" and "classifications" of services offered to business customers are just, reasonable and not unjustly or unreasonably discriminatory and were clearly necessary to protect businesses from higher prices and foregone entry and innovation by competitors. Indeed, the proverbial canary in the coal mine has already hit the ground. McLeodUSA, one of the competitors the Commission cited as evidence of the competitiveness of the Omaha market, has now announced that it cannot continue to compete in Omaha without UNEs. McLeodUSA has also stated that no other company will even purchase its Omaha operations, an obvious indication that investors have written off competition in Omaha as a possibility. If the Commission continues to fail to apply sound principles and grants unmeritorious requests for forbearance from unbundling, investors and competitors will write off competition in those markets as well. Businesses located in those areas will experience higher prices and less innovation, exactly the result Congress sought to avoid when it established the unbundling requirements in the Communications Act.

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This is the case with the six petitions filed by Verizon. The available evidence demonstrates that Verizon continues to control the only loop and transport facilities capable of serving the vast majority of business locations in the Verizon region generally and in the six MSAs at issue here. Both the GAO and the Justice Department reached this conclusion after comprehensively studying the market in the Verizon region. To the extent that facilities-based competition has developed sufficiently in particular wire centers to justify eliminating UNEs, the ILECs' unbundling obligations already have been eliminated pursuant to the *TRRO* triggers.

Intramodal competitors' limited (or nonexistent) deployment of DS-0, DS-1 and DS-3 loop or DS-1 or DS-3 transport facilities confirms that the Verizon petitions have no merit. Even competitors like TWTC, which is probably deploying its own loop and transport facilities at a faster pace than any other intramodal competitor, cannot deploy those facilities to most business locations. This is true even in New York City. To the extent that TWTC is able to deploy loops in New York City, it has done so largely in those wire centers in which unbundling has been eliminated by operation of the *TRRO* impairment triggers. Other intramodal competitors, including One Communications and Cbeyond, that serve only customers that demand less than DS-3 capacity of service, are never able to deploy their own loops.

Verizon has offered no basis for doubting that this is true. It relies on information regarding intramodal competitors' facilities deployment without identifying the wire center in which such facilities are located, thus making this information useless for purposes of the appropriate wire center-by-wire center analysis. To the extent that it is possible to identify the general location of the competitors' facilities mentioned by Verizon, those facilities-- like TWTC's-- are located in areas where unbundling has already been eliminated. Even if the facilities depicted in Verizon's maps and included in its mile totals for fiber deployment were

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located in wire centers where unbundling obligations remain, such maps and total mileage would, as the Commission has held, offer no basis for concluding that competitors have deployed facilities *at the specific capacities at issue here*. Verizon also relies on the presence of collocations, but the *TRRO* impairment triggers already account for the presence of collocations to the extent it is appropriate to do so. Nor is Verizon's reliance on competitors' use of special access relevant since the Commission has held that special access is not a substitute for UNEs when competitors seek to provide local service, in part because the very availability of UNEs disciplines ILEC conduct in the provision of special access.

The little evidence offered by Verizon concerning intermodal competitors' readiness, willingness or ability to serve business customers in the six MSAs also confirms that the Verizon petitions must be rejected. *First*, Verizon provides no evidence that cable operators in the six MSAs offer services that are substitutes for DS-0-based services (*e.g.*, xDSL) to business customers in any particular wire center. Of course, Verizon has offered no evidence that cable operators have actually won customers in this market in any particular wire center. Given the Commission's oft-repeated observation that cable networks simply do not reach many areas in which business customers are located, the Commission cannot assume that such service offerings reach many or most small businesses. Even if a cable operator is able to offer substitutes for DS-0 based services to businesses throughout a wire center over a network deployed to provide video services pursuant to a government franchise, such success offers no indication that other competitors lacking a cable company's unique advantages could also deploy loops and transport to provide such services. In any event, the presence of a single cable operator in the market does not give the ILEC the required "very strong market incentives" to offer DS-0 loops to competitors on terms and conditions that support efficient entry.

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Second, there is no evidence that cable operators are providing DS-1 or DS-3-equivalent services to businesses in the six wire centers at issue. It is well-established that cable companies' network locations (their networks often do not reach business customers) and the capabilities of their networks (cable companies generally cannot provide DS-1 or DS-3-based services over their hybrid fiber-coaxial (HFC) networks as those networks are currently configured) severely limit cable companies' ability to provide these services. To the extent that cable operators do provide these services, they must generally do so by deploying fiber networks like those deployed by intramodal competitors. In doing so, the cable companies appear to face the same entry barriers as those faced by intramodal competitors. Moreover, Verizon has not offered any evidence that cable companies have overcome these entry barriers in the six wire centers at issue here.

II. THE COMMISSION MUST APPLY THE APPROPRIATE ANALYTICAL FRAMEWORK WHEN CONSIDERING THE VERIZON FORBEARANCE PETITIONS

Under Section 10, forbearance shall be granted only where a legal requirement is no longer necessary to ensure the "charges, practices" and "classifications" of service offered by a carrier are just, reasonable and not unjustly or unreasonably discriminatory, where the legal requirement is no longer necessary for the protection of consumers and where a grant of forbearance comports with the public interest. In assessing petitions seeking forbearance from unbundling requirements, the Commission has focused on whether competition is sufficient to ensure that this standard is met in the absence of the unbundling obligations for which forbearance is sought. *See Omaha Order* ¶ 1, *Anchorage Order*, ¶¶ 27-30. In conducting that analysis with regard to the six petitions at issue in this proceeding, the Commission must utilize appropriate geographic and product markets, and it must grant forbearance only where sufficient facilities-based competition has taken root in the relevant markets. In this regard, the

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Commission's analysis must be informed by both its own precedent, its past mistakes in granting forbearance based on predictive judgments that have been proven to be incorrect and sound competition policy.

First, there is now little controversy that the appropriate geographic market for reviewing petitions for forbearance from unbundling local transmission facilities is no larger than individual wire centers. This was the approach the Commission followed in assessing loop impairment in the *TRRO*. Moreover, the Commission adopted wire centers as the geographic market for assessing UNE loop forbearance petitions in both Omaha and Anchorage.⁴ In all of these orders, the Commission rejected ILEC requests that it utilize a larger geographic area. Undeterred, Verizon has requested forbearance on an MSA-wide basis in its petitions without offering any basis for adopting this approach. As was the case in Anchorage, the large geographic areas covered by the six MSAs for which Verizon seeks forbearance contain “substantial topographical and density variations” and are not subject to uniform levels of competitive entry. *Anchorage Order* ¶ 15. For example, as discussed below, certain portions of the New York market exhibit extremely high deployment costs **[proprietary begin]** **[proprietary end]** There should be no doubt, therefore, that the Commission should utilize a geographic area that is no larger than a wire center to assess the instant petitions insofar as they address UNEs.

⁴ See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶¶ 60-61 (2005) (“*Omaha Order*”); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, FCC 06-188, ¶¶ 14-16 (rel. Jan. 30, 2007) (“*Anchorage Order*”).

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Second, it is critical that the Commission adopt and consistently utilize appropriate product markets for its analysis. With regard to UNEs, this means that the Commission should assess the extent to which competition, including intermodal competition, exists with regard to “each loop type” (*TRRO* ¶ 210) and each transport type. As the Commission stated in the *Anchorage Order*, this “remains the best way to structure [the] forbearance analysis.”

Anchorage Order ¶ 13. In conducting each product-specific analysis, the Commission has appropriately emphasized the need to analyze the extent to which competitors can provide services that are “substitutes” for ILEC services in the absence of UNEs. *See Omaha Order* ¶ 65. This means that the Commission must separately analyze the extent to which facilities-based competition exists at both the retail and wholesale levels for the services that ILECs provide *via* DS-0 loops (including xDSL services demanded by small business customers), DS-1 loops, DS-3 loops as well as DS-1 and DS-3 transport.

Unfortunately, the Commission did not actually conduct a separate analysis for each of these types of services in either the *Omaha Order* or *Anchorage Order*. After acknowledging the need for a separate analysis of each loop and transport type in each separate wire center, the Commission proceeded to rely on measures of competitive entry that ignored these critical distinctions. In the *Omaha Order*, the Commission relied on aggregate numbers of DS-0, DS-1 and DS-3 circuits sold by competitors to businesses across the nine wire centers in which it granted forbearance. *See id.* ¶ 69. But aggregate data across multiple wire centers offers no basis for granting forbearance in any particular wire center where competition for one or all of these circuits could be non-existent or *de minimis*. Similarly, in both the *Omaha Order* and the *Anchorage Order*, the Commission relied on aggregate data regarding cable network coverage for both residential and business customers (*see Omaha Order* ¶ 69; *Anchorage Order* ¶ 21), but

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such average data offers no reliable indication of the cable operator's network coverage for either the circuits demanded by residential customers or the circuits demanded by business customers. Furthermore, the Commission relied on Cox's success in the residential market as a basis for predicting that it would have similar success in the business market (*see id.* ¶ 66), without offering any basis for concluding that this would be the case. The conflation of separate markets in this manner is flatly inconsistent with the Commission's stated objective of separately analyzing the extent to which competitors' facilities and their services provided over those facilities comprise "substitutes" of "each loop type" for which forbearance was sought. The Commission must not repeat this mistake in the instant proceeding.

Third, the Commission must ensure that facilities-based competitors' end user connections are ubiquitous enough to ensure that competition in the relevant markets will continue to exist if Verizon is no longer required to unbundle DS-0, DS-1 and DS-3 loops and transport. For example, in both the *Omaha Order* and *Anchorage Order*, the Commission granted forbearance from Section 251(c)(3) unbundling obligations only in wire centers in which at least one intermodal competitor was offering service over its own "extensive last mile facilities." *Id.* ¶ 59. *See also Anchorage Order* ¶ 31 (applying "extensive" intermodal coverage standard because of "the importance facilities-based last-mile deployment plays in lessening the need for regulatory intervention"). The Commission has concluded that granting forbearance in wire centers "where no competitive carrier has constructed substantial competing 'last mile' facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition." *See Omaha Order* ¶ 60.

The Commission's measure for determining whether an intermodal competitor's last mile facilities have achieved "extensive" or "substantial" presence in a wire center and in a product

market is the “coverage” of end users. That is, a particular customer location is deemed to count toward the requirement of “extensiveness” or “substantiality” only where the intermodal competitor “uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC’s local service offerings.” *See Omaha Order* n.156. *See also Anchorage Order* ¶ 32 (applying coverage standard). Accordingly, an intermodal competitor’s network does not “cover” a customer location unless the competitor is able to serve that location with the full range of services offered in the relevant product market in a timeframe that is equal to or less than the time it takes for a reasonably efficient competitor to provide such services. Furthermore, the intermodal competitor must have substantial enough coverage in the wire center that “all of the customers capable of being served by [the ILEC] from [a] wire center will benefit from competitive rates.” *See Omaha Order* ¶ 69.⁵

But ubiquitous “coverage” by a single intermodal competitor by itself is not enough to meet the requirements of Section 10. The competitor must also have demonstrated substantial success in winning retail market share by providing services over its own network. *See id.* ¶ 64, n.177, ¶ 69; *Anchorage Order* ¶ 28. It is insufficient for the intermodal competitor to have established coverage but to have shown little success thus far in actually winning market share

⁵ In the *Anchorage Order*, the Commission inexplicably seemed to depart from this standard and concluded that GCI’s network covered customer locations that GCI would only be able to serve after it completed its network upgrade, which will take one-to-two years. *See Anchorage Order* ¶ 36, n. 114. Incredibly, the Commission even went so far as to suggest to GCI ways in which it could serve customers over its existing facilities. *See id.* n.122. Nevertheless, later in the Order, the Commission candidly expressed “concerns” that, in fact, GCI “is unable to provide symmetric high-speed service over its cable plant or otherwise unable to provide particular services to particular customers.” *See id.* ¶ 41. In any event, the Commission emphasized that the market conditions and GCI’s participation in the market in Anchorage are “unique.” *See id.* Thus, the Commission’s arbitrary finding that GCI “covers” customer locations that it cannot serve for one or two years should have no bearing on the instant petitions.

from the ILEC. Such success in the retail market must, again, be measured separately for each product market.

Moreover, even if an intermodal competitor has successfully competed in the downstream retail market, forbearance may not be granted unless there is sufficient competition to ensure that the ILEC will offer loops and transport at *wholesale* on terms and conditions that allow competitors in downstream markets to compete efficiently. As the Commission explained, it is critical that facilities-based wholesale competition “minimize[] the risk of duopoly and of coordinated behavior or other anticompetitive conduct.” *See Omaha Order* ¶ 71. *See also Anchorage Order* ¶ 46 (relying on continued rate regulation of ACS to prevent the development of “an impermissible duopoly”). To ensure this outcome, the record must support the conclusion that the ILEC have “very strong market incentives” to offer loops and transport on a wholesale basis to competitors on terms and conditions that allow efficient competitors to compete even if UNEs are eliminated. *See Omaha Order* ¶ 81; *Anchorage Order* ¶¶ 39-42 (relying on continued regulation to assuage concerns regarding the adequacy of competition in Anchorage). In determining whether this is the case, the Commission may not infer from the presence of a cable operator’s loop and transport facilities that others could deploy such facilities. *See TRO* ¶ 310 (deployment of facilities by intermodal competitors that benefit from “unique” advantages is largely irrelevant to whether other competitors could efficiently deploy the similar facilities). The Commission also may not rely on the availability of special access or Section 271 UNEs as a basis for eliminating UNEs. *See TRRO* ¶¶ 46-63.

As with so many other aspects of its forbearance orders, the Commission has acknowledged the need for a competitive wholesale market, but, in practice, it has granted forbearance in markets where such competition was obviously absent. For example, rather than

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conduct an analysis of the competitiveness of the wholesale market in Omaha, the Commission relied on a baseless “predictive judgment” that the presence of a single competitor with limited network coverage among business customers would give Qwest the incentive to offer competitors access to DS-0, DS-1 and DS-3 loops and DS-1 and DS-3 transport needed to serve business customers on reasonable terms and conditions that would support efficient competitive entry. Not surprisingly, this predictive judgment has proven to be incorrect. Since the adoption of the *Omaha Order*, McLeodUSA, one of the few CLECs that had previously tried to compete in Omaha, has announced that its business in Omaha is no longer viable and that, if the *Omaha Order* is not overturned, McLeodUSA will be forced to exit the market.⁶ This is because McLeodUSA has apparently been unable to obtain DS-1 facilities (either as special access or “271 UNEs”) from Qwest at prices that are low enough to sustain its business. *See id.* at 2. As McLeodUSA explains, “The Commission’s prediction that Qwest would negotiate a fair price with McLeodUSA outside the umbrella of regulation was patently incorrect.” *Id.* McLeodUSA reports that it has not even been unable to sell its business in Omaha to any prospective suitors and that it has received reasonable offers for its business in other markets where UNEs are still available. *See id.* at 3. McLeodUSA’s experience in Omaha since the elimination of UNEs illustrates the need for the Commission to ensure that higher levels of facilities-based wholesale competition exist than was the case in Omaha before eliminating unbundled loops and transport needed to serve businesses.

Finally, the Commission must ensure that interested parties have a meaningful opportunity to assess and comment on data regarding facilities-based entry in the relevant

⁶ *See* Letter of Patrick Donovan, Counsel, McLeodUSA, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No 04-223, at 1 (Dec. 18, 2006).

markets. As explained below, Verizon offers little of substance to support its petitions. This is in part due to the paucity of competition in the relevant markets. But the Commission will likely seek information from the few facilities-based competitors, in particular cable companies, as part of its assessment of the merits of the Verizon petitions. If so, the Commission must ensure that such information is made available to interested parties soon enough that expert economists have a meaningful opportunity to analyze that information and submit that analysis into the record. The D.C. Circuit has consistently held that failing to make critical factual information available to interested parties on a timely basis in a rulemaking proceeding violates the requirements of the Administrative Procedure Act (APA), *see* 5 U.S.C. § 553(c), and is reversible error. *See, e.g., Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 13-14 (D.D.C. 2004) (citing *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982); *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (same); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (same)).

III. THE COMMISSION SHOULD DENY VERIZON'S REQUEST FOR FORBEARANCE FROM LOOP AND TRANSPORT UNES IN THE SIX MARKETS SUBJECT TO VERIZON'S PETITIONS.

The available evidence demonstrates that Verizon continues to control the only viable transmission facility for serving the vast majority of business locations in its territory. This is true, even if one accounts for both intramodal and intermodal (including cable) competitors. Moreover, Verizon has offered no basis in its petitions to doubt that this is the case with regard to any wire center in the six MSAs at issue in which it is still obligated to provide unbundled DS-0, DS-1 or DS-3 loops or DS-1 or DS-3 transport needed to serve business customers. Even in the small business market, in which cable companies have apparently made some modest competitive entry by offering substitutes for services such as xDSL that rely on DS-0 unbundled loops, there is no evidence that a viable wholesale market would exist if unbundled DS-0 loops were eliminated.

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Verizon's control of bottleneck local transmission facilities (loops and transport) demonstrates that the continued availability of unbundled DS-0, DS-1 and DS-3 unbundled loops and DS-1 and DS-3 transport is (1) "necessary to ensure that the charges, practices," and "classifications" of services provided to small, medium and large businesses in the six markets at issue are "just, reasonable" and "not unjustly or unreasonably discriminatory;" and (2) "necessary for the protection of consumers" against higher prices charged by Verizon and foregone competition and innovation from UNE-based competitors. Denial of Verizon's request for UNE forbearance is also in the public interest for the similar reason that granting the request would lead to less competition, higher prices and less innovation for all business customers in all of the markets in which Verizon seeks this relief.

A. Aggregate Data Regarding All Competitors Demonstrates That There Is No Basis For Granting The Verizon Petitions For Forbearance From Unbundling Loops Or Transport Needed To Serve Businesses.

Virtually every federal government agency with relevant expertise has now examined the competitiveness of the local transmission (loop and transport) market generally, and in the Verizon region specifically. Every one of these agencies has reached the same conclusion: Verizon has overwhelming market power over the upstream loop and transport inputs needed to serve the small, medium and large business customers. Importantly, every one of these studies accounted for the presence of cable, wireless and other intermodal competitors.

For example, in a recent report, the Government Accountability Office ("GAO") determined that competitors have deployed few facilities in Verizon's markets or nationwide. That report found that, based on data from GeoResults and Telecordia, competitors have deployed transmission facilities to less than 5 percent of the buildings demanding at least DS-1

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level service in the 16 markets studied.⁷ As the GAO found, nearly all of the loops that competitors have deployed are well above the DS-1 level of capacity. In light of long-standing entry barriers, the GAO concluded that “wireline facilities-based competition itself may not be a realistic goal for some segments of the market for dedicated access...Where demand for dedicated access is less than 3 or 4 DS-1’s, it would appear unlikely that any competitor would extend its network for that business.” *GAO Report* at 42. Moreover, the GAO emphasized that its study *accounted for both intramodal and intermodal competition* (including cable companies and wireless). *See id.* at 47.

With regard to New York City and Pittsburgh in particular, the GAO found that competitors had deployed facilities to only 6.8 and 8.1 percent respectively of the commercial buildings in each MSA. Of course, as that report indicated, most of the loops deployed by competitors provide 2 DS-3s or higher of capacity. As a result, competitors likely have deployed loops to well below 6.8 and 8.1 percent of buildings in New York and Pittsburgh that only demand a single DS-3 of capacity or less. Moreover, only evidence of deployment at the DS-1 and DS-3 levels is relevant to determining whether eliminating access to DS-1 or DS-3 UNEs is appropriate.

The Justice Department also conducted an independent review of the market for high capacity local transmission facilities needed to serve businesses in the Verizon territory in connection with its review of the Verizon-MCI merger. The Department concluded that Verizon

⁷ *See GAO, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 22 (Washington, D.C., Nov. 2006) (“*GAO Report*”). The GAO acknowledged that GeoResults data could overcount or undercount the number of buildings served by CLECs and one “price-cap incumbent” suggested that GAO may undercounting by as much as 30 percent. Even if this were the case, “competitive alternatives exist in a relatively small subset of buildings.” *Id.*

controlled the only last-mile access to the “vast majority of commercial buildings in its territory,”⁸ and that high fixed and sunk costs make deployment of competitors’ facilities “difficult, time consuming and expensive...” *Id.* ¶ 27. Given its careful methodology in conducting market review of this sort, it is virtually certain that the Department considered all types of competition, including intermodal, cable and wireless.

Of course, the FCC reached similar conclusions in the *TRRO*. There, the Commission found that competitors serve only 3-5 percent of the commercial buildings nationwide.⁹ Moreover, the FCC found that it is not “economic” or “possible” for a reasonably efficient competitor to construct DS-0 loops anywhere in the country or DS-1 or even single DS-3 loops in the vast majority of wire centers in the country. *See TRRO* ¶¶ 149, 166.

Verizon’s own data confirm these conclusions. Less than two years ago, Verizon asserted that competitors had deployed loops serving “31,467+” buildings.¹⁰ Verizon indicated that, back in 1996, there were only 24,000 buildings “served directly by CLEC fiber.”¹¹ In other words, in nearly 10 years, competitors added connections to less than 8,000 buildings. Verizon’s own data underscores the difficulty of loop deployment and the ILECs’ continuing dominance of the market for transmission facilities capable of serving business customers.

⁸ *United States v. Verizon Communications, Inc. and MCI Inc.*, Case No. 1:05CV02103, Complaint ¶ 15 (D.D.C. filed Oct. 27, 2005).

⁹ *See TRO* ¶ 298 n.856 (stating that both “competitive LECs and incumbent LECs report that approximately 30,000, *i.e.*, between 3% to 5%, of the nation’s commercial office buildings are served by competitor-owned fiber loops”).

¹⁰ Verizon Comments, WC Dkt. No. 05-25, Attach. D, Declaration of Quintin Lew, at App. B (June 13, 2005).

¹¹ Verizon Comments, WC Dkt. No. 05-25, Attach. C, Declaration of William E. Taylor, at Table 10 (June 13, 2005).

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In its petitions, Verizon offers no evidence that the entry barriers associated with loop and transport deployment are any less significant or that competition in the local transmission market is any greater in the six markets at issue than is the case elsewhere in the country. Rather than attempt to address these findings, Verizon clouds the record with irrelevant and misleading information. Verizon relies on press statements and website sales material describing the business retail service offerings of competitors that rely on Verizon's loop and transport facilities, evidence that has no relevance to whether competitors can efficiently deploy such facilities themselves.¹² Verizon's extensive reliance on competitors' business E911 listings, an indication of market share gained by competitors that have deployed their own switches, is equally inapposite, because it is not a measure of the extent to which competitors relying on their own loops and transport have gained market share.¹³ This is a particularly significant issue in the business market, where many established competitors rely solely or largely on ILEC loops to serve their customers. Similarly, Verizon relies on the presence of systems integrators in the business market (*see, e.g., NY MSA Declaration* ¶¶ 69-70), but those firms *by definition* rely on the facilities of other carriers to provide services at retail to the enterprise market. Their presence in the market is therefore irrelevant to the question of whether competitors have and can deploy their facilities own transmission facilities.

Verizon's reliance on the recent RBOC/IXC merger orders to demonstrate the scope of facilities-based competition from intramodal and other types of competitors is also misplaced. In

¹² *See, e.g., Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 (c) in the New York Metropolitan Statistical Area*, WC Dkt. No. 06-172 (filed Sept. 6, 2006) ("*NY MSA Petition*"), Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the New York Metropolitan Statistical Area, ¶¶ 56-69 ("*NY MSA Declaration*").

¹³ *See, e.g. NY MSA Declaration* ¶ 47 ("As of [December 2005] competitors had obtained at least **[proprietary begin]** **[proprietary end]** business E911 listings.").

nearly every instance where Verizon cites to the RBOC/IXC merger orders, it points to the FCC’s discussion of *retail* competition for enterprise services.¹⁴ For example, in the Verizon/MCI merger order, the FCC merely concluded that the loss of legacy MCI in the retail special access market in Verizon’s region would be ameliorated by the presence of other *retail* competitors.¹⁵ Importantly, the RBOC/IXC merger orders reached no conclusions regarding the competitiveness of the market for transmission facilities in any particular geographic markets.

The parts of the Verizon/MCI merger order not cited by Verizon make clear that Verizon controls the only end-user connections serving the vast majority of commercial buildings in its territory. For example, the FCC found that Verizon can “access all or virtually all of the buildings and transport routes in its territory,” (*Verizon/MCI Merger Order* ¶ 30), and that “[t]he record also indicates that, for many buildings, there is little potential for competitive entry, at least in the short term. As the Commission has previously recognized, carriers face substantial fixed and sunk costs, as well as operational barriers, when deploying loops, particularly where the capacity demanded is relatively limited....” *Id.* ¶ 39. In any event, the Justice Department’s conclusion that Verizon controls the only last-mile access to the “vast majority of commercial

¹⁴ See, e.g., *NY MSA Petition* at 17 (citing Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 56 (2005) (“*Verizon/MCI Merger Order*”)) (“[R]etail competition for enterprise customers is ‘strong’ and will remain so ‘because medium and large enterprise customers are sophisticated, high volume purchasers of communications services that demand high-capacity communications services, and because there [are] a significant number of carriers in the market.’”).

¹⁵ See *Verizon/MCI Merger Order* ¶ 78 (“In conclusion, although we find overlap between the Applicants’ enterprise operations, we do not find that the increase in concentration resulting from the merger is likely to result in anticompetitive effects in [the retail enterprise] market. As discussed above, the record shows that, for all groups of business customers, there are multiple services and multiple providers that can meet their demand.”).

buildings in its region” forecloses reliance on the MCI merger analysis as supporting the instant forbearance petitions.

B. Verizon Has Not, And Cannot, Demonstrate That Facilities-Based Competition From Intramodal Competitors In Any Wire Center Within The Six Markets Is Sufficient To Justify Forbearance.

The available evidence concerning the extent to which intramodal competitors,¹⁶ considered separately from intermodal competitors, have or could deploy their own loop or transport facilities confirms that continued availability of unbundled DS-0, DS-1 and DS-3 loops and DS-1 and DS-3 transport is necessary to ensure that business services are offered on terms and conditions that are just, reasonable and not unjustly or unreasonably discriminatory. This is particularly true with regard to the specific cities for which Verizon seeks forbearance.

1. The Joint Commenters’ And Other Intramodal Competitors’ Experiences Demonstrates That They Are Unable To Deploy The Loops Or Transport Facilities For Which Verizon Seeks Forbearance

The Joint Commenters’ attempts to self-deploy loop and transport facilities confirms that there is no basis for further reducing the areas in which Verizon is still required to unbundle DS-0, DS-1 or DS-3 loops or DS-1 or DS-3 transport. TWTC’s experiences are especially probative, since TWTC is arguably constructing end user connections at a faster pace than any intramodal competitor in the market today. Of the [proprietary begin] [proprietary end] buildings served on-net by TWTC’s fiber in the New York MSA, [proprietary begin] [proprietary end] is characterized by demand for telecommunications service at the level of a single DS-1. Of TWTC’s [proprietary begin] [proprietary end] on-net customers demanding only a single DS-1, all are located in buildings to which TWTC is serving another customer with much higher

¹⁶ See *Triennial Review Order*, Separate Statement of Kathleen Abernathy at 3 (defining intramodal competition as “competitive LECs using their own facilities and incumbents’ loops and subloops”).

levels of demand. Indeed, TWTC almost always requires multiple DS-3's of demand to justify loop construction. TWTC is able to serve, nationwide, only 26.7¹⁷ percent of its customer locations on-net, while it is only able to serve [proprietary begin] [proprietary end] percent on-net in New York City because of obstacles unique to the New York MSA.¹⁸

Competitors that concentrate on serving only customers that demand one DS-3 of capacity or less are never able to construct their own loops. The highest capacity of service provided by One Communications is a DS-3, and it serves most of its customers with a single DS-1 or multiple DS-1s of capacity. None of these facilities offers One Communications sufficient revenue opportunities in any of its Verizon markets to justify loop deployment. Accordingly, it is not economically feasible for One Communications to deploy any loop facilities in the Verizon markets in which it competes, including Philadelphia, Providence, New York and Boston. Similarly, it is never economically feasible for Cbeyond to deploy its own loop facilities because its highest level of service, at 3 DS-1s, does not offer sufficient revenue opportunities to compensate for the costs of loop facilities.¹⁹ One Communications and Cbeyond have previously stated that neither company is able to serve such customers if forced to rely exclusively on special access facilities.²⁰

¹⁷ See Time Warner Telecom, Inc., SEC Form 10-Q Quarterly Report for the Period Ended September 30, 2006, at 27 (filed Nov. 9, 2006).

¹⁸ This disparity is due to the extremely high cost of fiber loop deployment in dense urban areas, especially in New York City. The comparatively high labor costs and right-of-way access fees, as well as comparatively long delays in obtaining permission to begin construction make facilities deployment especially difficult in New York City despite high revenue opportunities.

¹⁹ See Cbeyond, *Cbeyond® BeyondVoice™*, <http://www.cbeyond.net/business/packages.htm>.

²⁰ See Declaration of Robert J. Shanahan on behalf of Conversent ¶ 16, attached as App. H to Joint Comments of ALTS *et al.*, WC Dkt. Nos. 04-313 *et al.* (Oct. 4, 2004) (“...if ILECs were not required to sell loops at TELRIC regulated prices, it is extremely unlikely that Conversent

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The Joint Commenters' experience is typical. Nearly every one of the intramodal competitors cited by Verizon as competing for enterprise customers in the six MSAs in question continues to rely heavily on Verizon's facilities and can only deploy loop facilities to customers in extremely limited circumstances. In line with the FCC's findings in the *TRRO* and the experience of the Joint Commenters, these carriers cannot deploy loop facilities at the DS-1 level and, in most cases, demand multiple DS-3s of capacity to justify deployment. Moreover, as they indicate, many of these carriers rely heavily on UNEs, not special access facilities. With the exception of TWTC and PAETEC, intramodal carriers operating in the six markets at issue purchase special access only where UNEs are unavailable due to the operation of the *TRRO* impairment triggers or where Verizon rejects UNE orders due to the purported absence of facilities or some other excuse.²¹ If forced to rely exclusively on special access facilities, many

[now part of One Communications] would be able to purchase access to ILEC loops at process that would permit Conversent to provide competitive DS-1 level services.); Declaration of Rainer Gawlick on behalf of Lightship ¶ 13, attached as App. B to Joint Comments of ALTS *et al.*, WC Dkt. Nos. 04-313 *et al.* (Oct. 4, 2004) ("Lightship [now part of One Communications] commonly must pay 184% to 1,576% more to purchase connections to buildings as DS-1 Special Access versus DS-1 or DS-3 UNEs....These kinds of cost increases will have a significant negative impact on our performance."); Declaration of Richard Baatelan on behalf of Cbeyond ¶ 7, attached as App. C to Joint Comments of ALTS *et al.*, WC Dkt. Nos. 04-313 *et al.* (Oct. 4, 2004) ("Because of its high price and its provisioning characteristics, special access does not serve as a viable means of entry. ILEC special access tariff rates are too high for Cbeyond to make a profit by either reselling bare DS-1 transmission or by using ILEC special access as an input into Cbeyond's own retail offerings. Moreover, these rates have been steadily increasing.").

²¹ Indeed, the experience of many of these carriers with respect to the BOCs and specifically Verizon's unlawful manipulation of the UNE rules formed the basis for the FCC to reject the use of special access as a substitute for UNEs in the *TRRO*. See, e.g., *TRRO* ¶ 64 ("In short, in many cases, it appears that carriers expected to transition to UNEs – and pursued business models relying on this eventuality – but committed to long-term special access contracts in the interim.").

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(probably most) of these carriers would have to exit the market. The relevant intramodal competitors' market experiences are as follows.

➤ AT&T:

- AT&T cannot serve 2 DS-3s or less of capacity unless the location is within 88 feet of its network splice point. *See* AT&T Comments, WC Dkt. Nos. 04-313 *et al.*, at 36 (filed Oct. 4, 2004).
- AT&T can only reach 10 percent of its target market with its own loop facilities. *See* AT&T *ex parte* presentation, CC Dkt. No. 01-338 (Jan. 7, 2003).
- Where AT&T must rely on ILEC special access as an input, it cannot offer Ethernet service profitably at retail. AT&T Comments, WC Dkt. Nos. 04-313 *et al.*, Attach. B, Benway *et al.* Declaration ¶ 103 (filed Oct. 4, 2004).

➤ Bayring:

- “Overall, Bayring serves only approximately 5% of lines completely over self-provisioned facilities...” Declaration of Steven A. Wengert on behalf of BayRing, attached to Comments of ATX *et al.*, WC Dkt. Nos. 04-313 *et al.*, ¶ 15 (Oct. 4, 2004).
- “Bayring does not use special access circuits more widely because the pricing makes them uneconomic except as a short-term transition device.” *Id.* ¶ 16.

➤ Broadview

- Broadview has only built fiber transport to 20 percent of its collocations. Sommi Declaration on behalf of Broadview, attached to Joint Comments of the Loop and Transport CLEC Coalition, WC Dkt. Nos. 04-313 *et al.*, ¶ 4 (filed Oct. 4, 2004).
- It is only economical for Broadview to deploy fiber transport at capacities in excess of 3 DS-3s. *Id.* ¶ 6.
- If Broadview converted its network to special access, its transport and DS-1 loop costs would increase by approximately 225 percent. *Id.* ¶ 15.
- Broadview only uses special access when orders are rejected by Verizon for “no facilities.” *Id.*

➤ Broadwing

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- It is never economical for Broadwing to deploy its own loop facilities. Broadwing WC Dkt. 05-25, at 11 (filed June 13, 2005).
- The ILECs maintain a near monopoly over the DS-1 loop facilities that Broadwing demands. *Id.*

➤ Cavalier

- Construction of loops in urban areas is often prohibitively expensive and Cavalier will only construct such facilities if there is demand for “several DS-3 circuits” at a particular location. ALTS *et al.* Comments, App. I, Declaration of Brad A. Evans, WC Dkt. Nos. 04-313 *et al.*, ¶ 20 (filed Oct. 4, 2004).
- Cavalier experiences rejections for UNE orders from Verizon at a rate of 23 percent for DS-1 loops and 79 percent for DS-3 loops. *Id.* ¶ 22.

➤ Covad

- Covad has not deployed DS-1 loops and instead relies exclusively on the ILEC for such facilities. Covad Comments, Joint Declaration of Stephan Derodeff *et al.*, WC Dkt. Nos. 04-313 *et al.*, ¶ 44 (filed Oct. 4, 2004).
- Covad only purchases special access when UNEs are unavailable and based on the presumption that these circuits can quickly be converted to UNEs. Covad Reply Comments at 34. Typically, 35 to 40 percent of DS-1 UNE of Covad’s orders are rejected by Verizon because facilities are “unavailable.” Joint Letter of Covad *et al.*, CC Dkt. Nos. 01-338 *et al.*, at 2 (Aug. 9, 2004).
- Covad cannot profitably provide DS-1 services to business customers if forced to purchase all of its DS-1 services as special access. Special access prices are generally 150 to 250 percent higher than UNE prices. Covad Comments, Joint Declaration of Stephan Derodeff *et al.*, WC Dkt. Nos. 04-313 *et al.*, ¶ 45 (filed Oct. 4, 2004).
- In the NY MSA, the monthly rate for DS-1 transport is approximately 400 percent higher than the rate for DS-1 UNE transport. *Id.* ¶ 51.

➤ Level 3

- Level 3 “finds it largely impossible to find viable alternatives to ILEC special access services.” Level 3 Opposition at 10-11.

➤ NEON

- AT&T declarant Lee Selwyn states that “(NEON) indicated that, despite its metro fiber ring network, it does not usually provide local

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loops...NEON states that it does not provide end-user loop connectivity.”
Reply Comments of AT&T, WC Dkt. Nos. 04-313 *et al.*, Attach. D,
Selwyn Declaration ¶ 22 (filed Oct. 19, 2004).

➤ PAETEC

- PAETEC leases transmission facilities almost exclusively from the ILECs because there are few other wholesale alternatives. Comments of PAETEC, WC Dkt. No. 05-25, at 3 (filed June 13, 2005).
- PAETEC is reliant on ILEC special access for 95 percent of its loops. *Id.* at ii.
- Since the RBOC/IXC mergers, the market for local transmission services in Verizon’s territory has become less competitive. AT&T is not competing as aggressively in the Verizon region as it had prior to its merger with SBC. Comments of PAETEC, WC Dkt. No. 06-74, at 6-7 (filed June 5, 2006).

➤ Sprint

- As of the end of 2004, “Sprint relied upon the RBOC for almost 95 percent of its DS-1 circuits and 83 percent of its DS-3 circuits.” Comments of Sprint, WC Dkt. No. 05-25, at 7 (filed June 13, 2005).

➤ XO

- Less than 25 percent of XO’s DS-1 circuits are special access while more than 75 percent are purchased as UNEs. Tirado Declaration ¶ 44, attached to Joint Comments of the Loop and Transport CLEC Coalition, WC Dkt. No. 04-313 (filed Oct. 4, 2004) (“*Tirado Declaration*”).
- If XO were forced to purchase exclusively special access DS-1s, it could not compete. XO Emergency Petition for Expedited Determination that CLECs are Impaired Without DS-1 UNE Loops, WC Dkt. Nos. 04-313 *et al.*, at 30 (Sept. 39, 2004) (“*XO DS-1 Petition*”).
- Even under term and volume commitment plans, XO must pay 20 percent to 300 percent higher for special access DS-1 and DS-3 loops than for UNEs. *Tirado Declaration* ¶ 42.
- It is almost never economic for XO to construct its own DS-1 facilities. *Id.* ¶ 21.
- XO has rarely been able to purchase DS-1 and DS-3 loop facilities from other CLECs. In XO’s experience, CLECs offer DS-1 and DS-3 loops on a wholesale basis to fewer than five percent of the buildings that XO seeks to serve. *Id.*

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- It is never economic for XO to deploy DS-1 transport. *Id.* ¶ 35.
 - When XO orders special access, it never does so by choice, but it is often forced to do so because of Verizon’s “no-facilities available” policy. *XO DS-1 Petition* at 31.
 - Verizon makes XO wait 90 days to convert a special access DS-1 to a UNE and one year to convert a special access DS-3 to a UNE. *Tirado Declaration* ¶ 47.
- Xspedius (now part of TWTC)
- “It is almost never economic for Xspedius to construct its own DS-1 wireline loop facilities.” Declaration of James C. Falvey ¶ 26, attached to Joint Comments of the Loop and Transport CLEC Coalition, WC Dkt. Nos. 04-313 *et al.* (filed Oct. 4, 2004).
 - Xspedius generally requires at least 3 DS-3s of demand to construct a loop. *Id.* ¶ 23.
 - It would never be economic for Xspedius to deploy DS-1 transport facilities and Xspedius has never done so. *Id.* ¶ 29.
2. **Verizon Provides No Evidence That Intramodal Competitors Are Able To Deploy The Loops Or Transport Facilities For Which Verizon Seeks Forbearance**

Notwithstanding the overwhelming evidence to the contrary, Verizon attempts to argue that intramodal competitors’ purported success in deploying loops and transport facilities in the six urban areas in which it seeks forbearance demonstrates that unbundled loops and transport are no longer needed to ensure that business customers receive service at rates, terms and conditions that are just, reasonable and not unreasonably discriminatory. But this is not so. The information supplied by Verizon in support of this assertion simply cannot support the weight of its desired relief.

Most obviously, because the data that Verizon submits is either provided on an MSA-wide basis or on the basis of unidentified wire centers, it is generally not possible to determine the extent to which the intramodal facilities in question are located in wire centers in which Verizon has already been relieved of unbundling obligations due to the operation of the *TRRO*

impairment triggers. Moreover, there are many such wire centers in the six MSAs at issue. Overall, the six MSAs that are subject to Verizon's petitions have a much higher concentration of wire centers in which some form of loop or transport has been eliminated by operation of the impairment triggers than is the case in the nation as a whole. A comparison of the wire centers in the six MSAs at issue listed in Verizon's tariff for pricing flexibility in each of the six MSAs with Verizon's latest list of wire centers no longer subject to unbundling²² shows that, of the 576 wire centers in the six MSAs, (1) DS-1 loops are unavailable in 36 or 6.25 percent of the total wire centers, and (2) DS-3 loops are unavailable in 203 or 35.24 percent of the total wire centers. This is well above the percentage of wire centers for which loops are unavailable in the nation as a whole. By contrast, former Chairman Powell indicated that 99 percent of DS-1 loops would remain available as UNEs under the *TRRO* triggers.²³ With respect to transport, Tier 1 wire centers comprise 390 or 67.7 percent of wire centers in the six MSAs and Tier 2 wire centers comprise 167 or 29 percent of wire centers in these six MSAs.²⁴ By contrast, nationally, Tier 1 wire centers make up 5.4 percent of all RBOC wire centers (*see TRRO* ¶ 115) and Tier 2 wire centers make up 3.2 percent of all RBOC wire centers (*see id.* ¶ 119). Accordingly, to the extent that the six MSAs exhibit higher levels of facilities deployment than most markets nationwide, this deployment is already taken into account through the extensive regulatory relief that Verizon has received by operation of the *TRRO* triggers.

²² See *Verizon's Wire Centers Exempt from UNE Hi-Cap Loop and Dedicated Transport Ordering* (Jan. 24, 2007), at <http://www22.verizon.com/wholesale/attachments/verizonwirecentersexempt.xls> (last visited Mar. 5, 2007).

²³ See *Unbundled or Unplugged? The UNE Order*, Telecom Policy Report (Dec. 15, 2004).

²⁴ Any wire center that meets the Tier 1 trigger also meets the Tier 2 trigger.

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In light of the extensive unbundling relief that Verizon has already received in the six MSAs, no further relief is necessary or appropriate. Indeed, to grant Verizon further relief via the forbearance mechanism undermines the careful balance that the Commission struck in the *TRRO*. That balance already takes the level of facilities-based competition (fiber-based collocations) into account in determining whether Verizon must continue to provide high-capacity loops and transport. The FCC's determination was upheld by the Court of Appeals just six months ago, after several attempts to develop a set of unbundling rules that the Court could affirm. Now, Verizon seeks to upset that careful balance through use of the forbearance mechanism. The Commission should reject this attempt and should allow the balance struck in the *TRRO* to remain in operation.

Indeed, to the extent that it is possible to determine whether the intramodal facilities cited by Verizon are located in specific wire centers, it appears that they are concentrated in those wire centers in which Verizon has been granted unbundling relief pursuant to the *TRRO* triggers. For example, under the *TRRO* triggers, as the map attached hereto as Exhibit A indicates, competitors can no longer obtain unbundled loops or transport in large parts of Manhattan. This is almost uniformly true of the wire centers in the southern portion of Manhattan. As the maps and photographs included in the Verizon petition indicate, **[proprietary begin] [proprietary end]**

Even if Verizon had only submitted its data regarding intramodal competition for wire centers where unbundling rights remain in force, the data submitted by Verizon are poor indicators of intramodal facilities-based competition. Verizon has supplied the exact same types of data and proxies for intramodal competitor deployment (*e.g.*, fiber transport maps, maps showing lit buildings, special access spending data and data regarding CLEC fiber mileage) that

the Commission *explicitly rejected* as “not complete, not representative of the entire industry, not readily confirmable, and aggregated at too high of a level to be informative of market conditions.” *TRRO* ¶ 110.

For example, the fiber deployment maps Verizon filed in this proceeding, like those in the *TRRO*, do not show the capacity of competitors’ loops (if any) serving lit buildings. As the FCC explained in the *TRRO*, such maps have

little probative value in an impairment analysis for DS-1 or DS-3 loops. The maps provided...do not specify the capacity of service demanded in particular locations along the competitive routes identified; if those locations require capacity only at multiple DS-3 or higher capacities, and are providing revenues commensurate with those capacities, then the presence of competitive routes is not relevant to the question of whether it is economic to deploy to serve customers at the DS-1 level, or even the single DS-3 capacity level.

Id. ¶ 187.

The transport routes indicated on Verizon’s maps are equally unreliable indicators of where competitors are able to economically deploy transport. *See NY MSA Declaration, Exs. 5-6.* Such maps “do not indicate whether carriers operating the fiber depicted are using these facilities to provide local service or merely interoffice transport, long-distance service, wireless service, or some combination of services other than local exchange service.” *TRRO* ¶ 188.

For similar reasons, Verizon’s assertions regarding the [proprietary begin] [proprietary end] of fiber route miles or the number of fiber networks²⁵ purportedly deployed by competitors in the six MSAs are not probative. As the FCC has held, data regarding the number of fiber route miles is an “unreliable” and “unsuitable” indicator of the level or likelihood of loop deployment. *See id.* ¶ 110. In fact, in defending the *TRRO* before the D.C. Circuit, the FCC

²⁵ *See, e.g., NY MSA Declaration* ¶ 10 (“According to Geotel, there are at least 24 known competing carriers that operate fiber networks within the New York MSA, and these networks span at least [proprietary begin] [proprietary end] route miles).

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estimated that only one fifth of the thousands of transport route miles that the ILECs claimed were concentrated in areas where demand for high capacity facilities was greatest could actually be used to provide local services. *See FCC TRRO* brief at 65. There is every reason to think that Verizon has resorted to the same sort of overcounting in this proceeding.

The characteristics of TWTC's transport network underscore the defects in Verizon's data regarding local transport. The map attached as Exhibit B hereto shows nearly all of the portion of TWTC's NY MSA network that is capable of providing local exchange services.

[proprietary begin] [proprietary end]

Verizon's reliance on the number of collocators in some subset of wire centers²⁶ in each of the six MSAs is also inapposite. To begin with, the Commission's impairment triggers already account for the presence of collocators. Pursuant to those triggers, unbundled transport can be eliminated based solely on the presence of collocators. But, the FCC rejected the presence of collocations, on their own, as probative of the ability of competitors to deploy loops. *See TRRO* ¶ 168. It instead relied on a combination of collocations and business access lines in a wire center to determine loop impairment. The FCC's decision not to rely on collocations alone reflects market realities. For example, Cbeyond and One Communications are collocated in **[proprietary begin] [proprietary end]** and 700²⁷ central offices respectively, yet, as explained,

²⁶ *See, e.g., NY MSA Declaration* ¶ 49 ("As of the end of December 2005, approximately 40 CLECs are collocated in Verizon's central offices in the New York MSA. These competitors are collocated in a total of **[proprietary begin] [proprietary end]** central offices that reach **[proprietary begin] [proprietary end]** percent of Verizon's retail access lines in the MSA, and approximately **[proprietary begin] [proprietary end]** percent of Verizon's switched business lines in the MSA.").

²⁷ *See One Communications, Inc., Our Network Always Gets High Ratings, at* http://www.onecommunications.com/network/index-network-technology.aspx?TierSlicer1_mtid=12&TierSlicer1_mtt=4&TierSlicer1_mid=8 (last visited Feb. 28, 2007).

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it is not possible for either company deploys its own loops. Accordingly, there is no basis for the Commission to rely on collocations alone in a wire center in this proceeding. Furthermore, Verizon does not even provide collocation data on an individual wire center basis, thus preventing a wire center-specific review.

Nor is Verizon's assertion that competitors' reliance on special access *in lieu* of UNEs (see, e.g., *NY MSA Declaration* ¶ 47) remotely supportive of this requested relief. Verizon seeks forbearance from UNEs used to provide local service, since the Commission has already eliminated unbundling requirements for loops and transport facilities used solely to provide interexchange or mobile wireless services. See *TRRO* ¶ 34. But Verizon's data in this proceeding do not distinguish between special access used to provide local service and special access used to provide interexchange service and wireless services. As the FCC has found, "the majority of special access arrangements are used to provide service in the mobile wireless and long distance markets." See *id.* ¶ 64. Qwest has stated that, with respect to the local market, the vast majority of its DS-1 circuits are purchased as UNEs, not special access. See *id.* n.176. In Anchorage, the incumbent, ACS, has stated that almost all special access purchased by competitors is used as an input for interexchange service.²⁸ Verizon's failure to differentiate between special access used to serve the local market from special access used as an input to provide interexchange and wireless service renders its reliance on this information little more than empty rhetoric.

But even if Verizon were to provide evidence that competitors use special access to provide local service, this would not support its request for forbearance. As mentioned, the

²⁸ See *ex parte* presentation at 5, attached to letter of Karen Brinkman, Counsel, ACS, to Marlene H. Dortch, Secretary, FCC, WC Dkt. 05-281 (filed Dec. 19, 2006).

Commission has held that special access is simply not a replacement for UNEs for purposes of serving the local market, given that ILECs have the ability to engage in all manner of “abuse” when providing special access (most obviously by unilaterally raising prices) and given that special access prices are constrained by the availability of UNEs. *See id.* ¶ 62. Moreover, the DC Circuit upheld this conclusion as reasonable. *See Covad Communications v. FCC*, 450 F.3d 528, 531 (D.C. Cir. 2006).

Verizon also suggests that competitors that have deployed their own fiber transmission facilities are present in a high percentage of those wire centers that account for **[proprietary begin] [proprietary end]** percent of Verizon’s high-capacity special access revenues.²⁹ Verizon’s implication is that, in those markets where competitors purchase large amounts of special access services, they also deploy local fiber facilities. But Verizon neglects to mention that it made a nearly identical argument in the *TRRO*, and the FCC responded that data regarding high concentrations of special access spending is simply duplicative of the *TRRO* impairment triggers.³⁰ Indeed, it is likely that the substantial number of wire centers in the six MSAs where UNEs are *already* no longer available exhibit the highest percentage special access purchases.

²⁹ *See e.g. NY MSA Declaration* ¶ 46 (“These data also show that there are one or more known competing fiber providers in at least **[proprietary begin] [proprietary end]** percent of the **[proprietary begin] [proprietary end]** wire centers in the New York MSA that account for **[proprietary begin] [proprietary end]** percent of Verizon’s high capacity special access revenues.”).

³⁰ *See TRRO* n.477 (“Despite our concerns about the incumbent LEC special access data, we note that even those data indicate that most competitive activity is focused in a limited percentage of wire centers. To put this figure in context, we note that Verizon maintains that nearly 80% of the demand for special access services is concentrated in 8% of its wire centers.... Consequently, even if we relied on tariffed incumbent LEC services to evaluate impairment in the relevant markets...we anticipate that such data likely would lead us to identify many of the same wire center service areas that we identify here as areas where competitive LECs are not impaired. Specifically, the analysis we adopt here denies unbundling in wire center service areas

Finally, even if all of the maps and other data submitted by Verizon were relevant to the ability of competitors to provide local service, the FCC has already held that that sort of data does not justify eliminating unbundling on an *MSA-wide* basis. Faced with similar RBOC supplied data in the *TRRO*, the FCC concluded that, even “if we were even able to surmount the weaknesses” with respect to the RBOCs’ data, “they do not indicate sufficiently pervasive deployment to justify an MSA-wide bar on unbundling.” *TRRO* ¶ 189. Indeed, **[proprietary begin] [proprietary end]**. In any case, Verizon’s maps cannot serve as a basis for eliminating unbundling in the MSAs in question in whole or in part.

In sum, it is clear that intramodal competitors have been and continue to be unable to efficiently deploy the DS-0, DS-1 or individual DS-3 loops or the DS-1 or DS-3 transport facilities for which Verizon seeks forbearance from unbundling obligations. These kinds of carriers do not in any material way contribute to the kind of “extensive” facilities-based retail or facilities-based wholesale competition that is a necessary prerequisite for meeting the Section 10 forbearance test for UNEs.

C. Verizon Has Not, And Cannot, Demonstrate That Cable Competitors Offer Sufficient Competitive Discipline In The Provision Of DS-0, DS-1 Or DS-3 Based Services In Any Wire Center In Any Of The Urban Areas At Issue.

Verizon relies on purported evidence that some cable companies offer some services to some business customers in an attempt to show that *all* cable companies throughout *all* six MSAs are “ready, willing and able” to provide services to all types of businesses throughout all six MSAs. Verizon’s only evidence supporting this conclusion is a set of maps showing cable franchise areas throughout each of the six MSAs along with statements from the cable

exhibiting high potential revenues – the same wire centers, according to the BOCs’ advocacy, most likely to offer tariffed alternatives to competitive LECs.”).

companies' websites (that generally do not differentiate among offerings available in different geographic areas) stating that cable companies serve business customers. *See, e.g., NY MSA Declaration ¶¶ 51-55 & Ex. 3.* Verizon implies that if a cable company advertises services to businesses on a national basis, then *ipso facto*, that "all of the customers capable of being served by [the ILEC] from [a] wire center will benefit from competitive rates." *Omaha Order* ¶ 69. This is simply not so.

1. Verizon Provides No Basis For Concluding That Cable Modem Competition Obviates The Need For The Unbundled DS-0 Loops Needed To Serve Very Small Business Customers.

As discussed at length above, certain criteria must be met before competition from cable companies justifies the elimination of unbundling requirements in a particular product market. To justify removal of DS-0 unbundling obligations, Verizon must show, at the least, that (1) the cable company's network "covers" the wire center in question and is capable of providing the full suite of services that Verizon provides to small businesses over DS-0 loops; (2) the cable company has achieved substantial success in winning retail market share by providing DS-0 equivalent services over its own network; and (3) the presence of facilities-based competitors in addition to the cable company give Verizon "very strong market incentives" to offer DS-0 loops at wholesale on terms and conditions that permit viable retail competition in the absence of DS-0 UNE loops. Verizon has not shown that any of these criteria has been met in any wire center in any of the six markets at issue.

Verizon fails the first criterion because it has provided no data with respect to the actual coverage of cable company networks capable of providing services that are substitute for those that Verizon provides over DS-0 loops. Moreover, there is good reason to doubt that such data would support the denial of the petitions with regard to DS-0 loop unbundling. The FCC has found that cable companies are "focusing their marketing" of business services on business

customers that are “near [their] residential network[s].” *TRRO* ¶ 193. Moreover, as GCI has explained an upgraded cable plant alone is not, by itself, sufficient to enable a cable operator to provide all the DS-0 services demanded by small businesses.³¹ Verizon has provided little indication of the capabilities of the cable networks in its markets, and it has provided no data on the extent to which particular network capabilities are available in particular wire centers in each MSA. At most, it is unknowable where and to what extent cable competitors are capable of providing the full suite of DS-0-based services to small business customers.

Verizon fails the second criterion because it has provided no evidence of cable company success in winning small business customers in the six MSAs at issue. Verizon only provides a sampling of the services advertised by cable companies to small businesses, often on a national basis. The fact that a company may offer a service nationally, or even on a market-by-market basis, has no bearing on whether the company has had any success in actually gaining retail market share.

Verizon has provided the number of business E911 listings by cable company and by MSA (*see, e.g., NY MSA Declaration* ¶ 52), but such data is not probative. As a threshold matter, the Commission should disregard all such data as it was obtained in violation of law and customer privacy rights.³² Even if the Commission were to consider such data, it should be

³¹ *See Letter of John T. Nakahata et al.*, Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, at 6 (Nov. 14, 2006) (“Even assuming its cable facilities enter a building with small business customers, GCI’s [phone service technology provided over HFC] is currently incompatible with a number of common small business applications, including multiline or directory number hunt capability, ground start or wink start trunk PBX/Key systems, and many alarm systems.”) (“*GCI Nov. 14 ex parte*”).

³² *See e.g.,* Comments of Cox Communications Inc. on Motion to Compel Disclosure and Motion to Dismiss, WC Dkt. No. 06-172 (filed Oct. 30, 2006) (arguing that the use of E911 data by Verizon violates interconnection agreements); Reply Comments of Time Warner Telecom *et al.*,

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given no weight. The data are not disaggregated by wire center. In addition, E911 data do not demonstrate the extent to which small businesses are able to and actually are purchasing broadband (cable modem service) from the cable company.

Finally, Verizon fails the third criterion because it has not shown why it would have “very strong market incentives” to offer DS-0 facilities at wholesale on terms and conditions that support efficient retail competition in the absence of a regulatory compulsion to do so. It has not even claimed that it will maintain rates that would permit retail competition from multiple providers to remain viable. If Qwest has not offered reasonable rates for “Section 271” UNE DS-1s (discussed above), there is no reason to believe that Verizon’s incentives will be any different with respect to deregulated DS-0 facilities in its markets. In fact, given the absence of any facilities-based competitors in the small business market other than cable companies (and even the extent of cable competition unknowable), it is likely that Verizon would have even less incentive to provide wholesale access to DS-0 loops than Qwest has with regard to DS-1 loops in Omaha.

Nor could the Commission rely on a cable company’s provision of DS-0 equivalent services over its HFC network as the basis for a prediction that other competitors could offer such services over their own facilities. As mentioned, the Commission has correctly concluded that such inferences are inappropriate where the competitor that has deployed its own facilities in a market in which it benefited from advantages that are “unique” among non-ILECs. This is certainly the case with cable companies, since their legacy position in the video market has

WC Dkt. No. 06-172 (filed Nov. 6, 2006) (arguing that Verizon has used data in this proceeding from the Verizon/MCI merger order in violation of the protective order in that proceeding).

allowed them to sink the investment in loops needed to serve mass market customers and to benefit from economies of scope that are simply unavailable to other competitors.

In the absence of appropriate regulation or incentives to sell their facilities at wholesale, it is probable that, at best, Verizon and cable operators would be the only two competitors in the provision of services to small businesses with Verizon retaining a now unregulated monopoly over the wholesale market. In those markets where cable companies' networks are not capable of providing the full suite of DS-0 equivalent services demanded by small businesses, Verizon would hold a monopoly over the retail market in those areas as well. Markets such as these simply cannot meet the Section 10 forbearance standard.³³

2. Verizon Provides No Basis For Concluding Cable Competitors Provide Meaningful Competition In The Provision Of DS-1 Or DS-3 Services.

While there is little support for Verizon's assertion that cable competition justifies the elimination of DS-0 loops needed to serve small businesses, there is even less support for its similar claim with regard to DS-1 or DS-3 loops or transport. *First*, the FCC has concluded numerous times that cable companies' network location and architecture prevent them from providing DS-1 or DS-3 service on a widespread basis. In the *TRO*, the Commission determined that HFC networks generally do not serve businesses (*i.e.*, provide services such as DS-1s or DS-3s) and that "[t]he cable companies have remained focused on mass market, largely residential service consistent with their historic residential network footprints." *TRO* ¶ 52. In the *TRRO*, the Commission concluded that cable companies focus on selling cable modem services to

³³ *Cf.* Kevin Martin, Chairman, FCC, Remarks at the Georgetown University McDonough School of Business's Center for Business and Public Policy (Nov. 30, 2006) ("Our ultimate goal however, is for consumers to be able to choose from among a multiplicity of broadband service providers, rather than just one or two.").

“home offices or very small stand-alone businesses, neither of which typically requires high-capacity [DS-1 or DS-3] loop facilities.” *TRRO* ¶ 193. At most, these services are substitutes for DS-0-based services.

Most businesses have thus far apparently viewed cable modem service as insufficient for their needs, because “bandwidth, security, and other technical limitations of cable modem service render it an imperfect substitute for service provided over DS-1 loops.” *Id.* In addition, the absence of cross elasticity of demand between cable modem service and DS-1 or DS-3 wireline broadband transmission facilities indicates that they are not substitutes.³⁴

All of these conclusions have recently been reiterated by GCI, itself a cable company, in the docket concerning forbearance from UNE regulation in the Anchorage Alaska study area. The record in that proceeding conclusively showed that neither GCI nor any other cable company can serve enterprise customers with its HFC plant. As GCI has repeatedly explained, “existing cable technology does not yet permit GCI to provide reliable or economical large-scale DS-1 level services to medium and large business customers.”³⁵ As a result, GCI can only serve enterprise customers in Anchorage with its fiber plant, which is much less extensive than its HFC plant. Moreover, as explained in footnote 4, *supra*, the Commission essentially agreed with GCI that these limitations preclude GCI from providing a meaningful competitive alternative to the incumbent LEC in Anchorage.

³⁴ See *TRRO* ¶ 193 (“Commenters also note that businesses that do require DS-1 loops are willing to pay significantly more for them than the cost of a cable modem connection, which also indicates that the two are not interchangeable. Finally, at least two competitors maintain that, based on their internal data, they rarely lose enterprise customers to cable providers.”).

³⁵ See *GCI Nov. 14 ex parte* at 9. See also Letter of John T. Nakahata, Counsel, GCI, to Marlene H. Dortch; Secretary, FCC, WC Dkt. No. 05-281, at 26-30 (filed July 3, 2006) (“*GCI July 3 ex parte*”); Declaration of Dennis Hardman; attached to *GCI July 3 ex parte*; Declaration of Gene Strid, attached to *GCI July 3 ex parte*.

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It is also worth noting that cable companies are unlikely to be able to commit to Service Level Agreements, or SLAs, when providing service over their HFC network to business customers. The Joint Commenters have found that offering an SLA is often a necessary prerequisite to serving a medium or large business customer.³⁶ Cable companies' likely inability to offer SLAs appears to pose a major barrier to serving medium and large business customers over HFC networks.

A review of the products advertised by cable companies in the six markets in which Verizon is seeking forbearance further reinforces the FCC's prior conclusions that HFC-based services are only capable (when they are actually upgraded and cover the relevant geographic area) of serving the smallest businesses and that only fiber-based services are capable of satisfying the demands of enterprise customers. Some of these products are summarized below:

- Comcast
 - Comcast's highest speed HFC service provides service at 1 Mbps to 8 Mbps, while "actual speeds may vary and are not guaranteed."³⁷ The terms and conditions of Comcast's Business Cable Modem Service states that "Comcast makes no representation regarding the speed of the service other than the placement by Comcast of maximum speeds on Services Ordered. Service speeds are approximate and burstable speeds only. Speeds may vary and be slower than the customer expects at times."³⁸

³⁶ As defined by Newton's, an SLA is "an agreement between a user and a service provider, defining the nature of the service provided and establishing a set of metrics....to be used to measure the level of service provided measured against the agreed level of service...The SLA also typically establishes trouble-reporting procedures, escalation procedures, penalties for not meeting the level of service demanded -- typically refunds to users." *Newton's Telecom Dictionary* 739 (CMP Books 20th ed. 2004).

³⁷ See Comcast Corp., *Comcast Workplace*, at <http://www.comcast.com/business/workplaceFeatures.html>.

³⁸ See Comcast Corp., *Comcast Workplace, General Terms and Conditions*, Art. 2.2, available at <http://www.comcast.com/business/legal/Workplace%20Terms%20and%20Conditions%20081006%20FINAL.pdf>.

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- By contrast, Comcast's fiber-based Ethernet Service provides traffic prioritization between different applications as well as "99.97% network availability."³⁹
- Cox
 - Cox's business class cable modem service for "small business" does not guarantee availability or bandwidth. A disclaimer on its website states: "Actual modem speeds vary. Number of users and network management needs may require Cox to modify upstream and/or downstream speeds. Cox cannot guarantee uninterrupted or error-free Internet service."⁴⁰
 - By Contrast, Cox's "Optical Internet" fiber based service offers speeds from T-1 to "Gigabit or higher."⁴¹ SLA's are available to guarantee packet-loss and latency.
- Cablevision
 - Cablevision's HFC service is "[f]or smaller businesses requiring high speed Internet access for four or fewer users."⁴² Cablevision compares its HFC service and calling plan to the "Verizon Freedom for Business" package⁴³ which provides a combined local/LD plan along with ADSL service.⁴⁴

³⁹ See Comcast Corp., *Enterprise Network Service*, at <http://www.comcastcommercial.com/index.php?option=content&task=view&id=8&Itemid=37>.

⁴⁰ See Cox Communications, Inc., *Cox Business Internet*, at <http://www.coxbusiness.com/products/data/businessinternet.html>.

⁴¹ See Cox Communications, Inc., *Cox Optical Internet*, at http://www.coxbusiness.com/pdfs/cox_optical.pdf

⁴² See Cablevision Systems Corp., *Business Class Optimum Online*, at http://www.cablevision.com/index.jhtml?pageType=cc_oool.

⁴³ See Cablevision Systems Corp., *Optimum, Compare and Take Control of Your Communications Costs*, at <http://www.optimum.com/business/oool/compare.jsp>.

⁴⁴ Like HFC-based products, Verizon's ADSL service provides an asymmetrical service "up to" 3 Mbps downstream and 786k upstream and "[t]hroughput speeds vary and speeds and uninterrupted service [are] not guaranteed." See Verizon Comm., Inc., *Verizon Freedom for Business with DSL*, at <http://www.22.verizon.com>. For this reason, DSL, like HFC-based services, generally do not offer robust service level agreements. See Earthlink, Inc., *Earthlink Business High Speed*, at <http://www.earthlink.net/biz/highspeed/enterprise/sla/> (specifically

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- Cablevision makes a clear distinction between its fiber-based and HFC-based products for businesses: “Optimum Lightpath is going after medium and large-sized enterprises and Optimum Voice is going after smaller businesses.”⁴⁵
 - The price differential between its HFC and fiber-based product clearly indicates that these offerings belong in different product markets. While its 10/2 Mbps HFC product costs only \$49.95⁴⁶, a 10 Mbps symmetrical fiber connection costs \$1,300 per month.⁴⁷ Clearly, such a large price difference for similar bandwidth indicates that Cablevision’s HFC and fiber-based products are not in the same product market.
 - Cablevision’s Lightpath.net fiber-based Ethernet service provides service level commitments, 99.99% network availability and a “SONET-like” carrier class recovery rate of <50 ms.⁴⁸
- Time Warner Cable
- The disclaimer on TWC’s New York website for its business class HFC product states that “All speeds are approximate; no throughput is guaranteed”.⁴⁹
 - By contrast, its fiber-based “Ethernet Internet Access service” for the New York market provides for “specific and well defined service level agreements. There is a guaranteed level of service between the clients’ location and TWC Internet Edge Router, along with other service

excluding ADSL and SDSL service from Earthlink’s SLA that applies to its DS-1 and DS-3 based services).

⁴⁵ Cablevision Systems Corp., *Cablevision Systems Q2 2006 Earnings Conference Call Transcript (CVC)*, at 8 (Aug. 8, 2006) (quoting Tom Rutledge, Cablevision Chief Operating Officer), available at <http://media.seekingalpha.com/article/15172>.

⁴⁶ See Cablevision Systems Corp., *Optimum Pricing*, at <http://www.optimum.com/business/ool/pricing.jsp>.

⁴⁷ See Cablevision Systems Corp., *Optimum Lightpath, E-Line Pricing*, at <http://www.optimumlightpath.com/Interior214.html>.

⁴⁸ See Cablevision Systems Corp., *Optimum Lightpath, E-Line*, at <http://www.optimumlightpath.com/Interior212.html>.

⁴⁹ See Time Warner Cable, *Business Services - Business Class*, at http://www.twcny.com/index2.bus.cfm?c=new_bus/roadrunner#express.

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parameters including restoration times, end-to-end latency across TWC network and packet delivery to the Edge Router.”⁵⁰

➤ RCN

- Its highest speed HFC product is designed for “small businesses” and its highest speed is 20 Mbps downstream and 2 Mbps upstream.⁵¹
- By contrast, its fiber-based Ethernet service provides SLAs and “99.99 % network availability” from 1 Mbps of symmetrical bandwidth to 1 Gbps.⁵²

To the extent that cable companies are providing DS-1 or DS-3 services, the available evidence indicates that they do so via traditional fiber loop facilities, not their HFC networks.⁵³ Because their fiber network architectures are similar to intramodal competitors’ networks, cable companies likely face many of the same barriers when deploying such loops as intramodal competitors face.⁵⁴ Cable companies generally deploy their fiber transport networks in rings running through the densest portions of urban areas. From these fiber rings, they seek to deploy fiber laterals to individual end-user customers where the revenue opportunities compensate for the cost of construction. As RCN explains, its addressable market of “near net” buildings

⁵⁰ See *Time Warner Cable, Business Services - Private Networks*, at http://www.twcny.com/index2.bus.cfm?c=new_bus/privatenetwork.

⁵¹ See RCN Corp., *Small Business*, at <http://www.rcn.com/smallbusiness/internet.php>.

⁵² See RCN Corp., *Business Solutions - Services*, at http://www.rcnbusinesssolutions.com/services/network_services/ethernet_transport.php.

⁵³ For example, the Commission rejected Qwest’s assertion that it had lost customers to “intermodal competition” from cable companies because “those losses are to the circuit-switched telephony service offered by Cox’s competitive LEC affiliate [which relies on traditional fiber-based loops], rather than to its cable operation.” *TRRO* ¶ 193, n.514.

⁵⁴ See *id.* ¶ 95 (noting that fiber-based competition from cable companies is captured by the FCC’s collocation-based impairment standard). Just like traditional wireline carriers, cable companies, “may collocate in order to access incumbent LEC loops, to interconnect with the incumbent LEC or other carriers, or to provide wholesale transmission services.” *Id.* n.270.

consists of only those buildings within 500 feet of its fiber transport network.⁵⁵ Moreover, laterals can only be connected to “splice points” on the transport network, which are generally located every 2,000 feet. *See TRRO* n. 226.

The map of Time Warner Cable’s (“TWC’s”) fiber network in lower Manhattan submitted into the record by Verizon illustrates the apparent limits of cable fiber loop deployment. TWC’s fiber transport facilities depicted on the Verizon map are constructed via four interlocking rings that are at their densest in lower Manhattan where the demand for enterprise level services is high. Yet, up to a mile separates the routes of this network, making it unlikely that TWC can economically deploy fiber laterals (with a likely range of about 500 feet and subject to the likely distribution of splice points every 2,000 feet) to most portions of the city. The map only shows a single ring throughout Brooklyn and Queens, making lateral construction in those boroughs even more difficult and unlikely. In fact, the map attached hereto as Exhibit B indicates that **[proprietary begin] [proprietary end]** percent of its customers on-net in the NY MSA because of the uniquely high costs of serving the New York market discussed above. Given that **[proprietary begin]**^{56 57} **[proprietary end]**

In light of the apparent limitations of HFC networks and the substantial barriers to fiber loop deployment, market analysts have indicated that cable companies have been slow even to attempt to serve medium and large businesses. Where they have begun to serve businesses,

⁵⁵ *See RCN Corp., Business Solutions - About Us, at* <http://www.rcnbusinesssolutions.com/about/index.php>.

⁵⁶ Although it is not clear when GeoResults performed its survey, its estimate **[proprietary begin] [proprietary end]**

⁵⁷ GeoResults does track the buildings that cable companies’ have lit with fiber. Indeed, Cablevision’s Lightpath subsidiary is listed as having **[proprietary begin] [proprietary end]** lit buildings in New York City.

cable companies are focusing on serving only very small businesses. For example, one analyst has indicated that, while “cable companies have recently announced their intention to aggressively enter the *Small Business segment*...AT&T has seen very limited activity and we do not expect a significant threat to come from the cable companies.”⁵⁸ Independent analysts agree that cable companies are generally not competing to provide service to medium and large business customers (those demanding DS-1 and DS-3 level services), “due to MSOs’ lack of national and international footprint, and the stringent requirements of enterprise telecommunications.”⁵⁹ Larger businesses “require service level agreements (SLA), a broader array of services and a wider presence” than cable companies apparently provide today in most locations. *Id.*

While Verizon and other ILECs may claim in their pleadings to the FCC that cable companies are important competitors in the market for DS-1 and DS-3 service, their statements to analysts indicate otherwise. When asked by a Wall Street analyst whether BellSouth was “seeing competition on the small-, medium-sized enterprise space,” BellSouth CFO Pat Shannon responded “Not any -- I am sure that our guys see some of them. Some of the better players, like Cox and Time Warner, but it has not risen to a level that I have seen any trends that I could share with you...”⁶⁰ In its most recent earnings call, AT&T said this of Cox’s efforts in the business market: “They are looking to migrate some of their consumer products predominantly and

⁵⁸ Lehman Brothers Equity Research, *AT&T: 3Q Reflects Improving Business Trends*, at 3 (Oct. 24, 2006) (emphasis added).

⁵⁹ Jim Duffy, *Cable Companies Intensify Enterprise Service Ambitions*, Network World, Oct. 24, 2006, available at <http://www.networkworld.com/news/2006/102406-cable.html?page=1>.

⁶⁰ See BellSouth Corp., *BellSouth Q2 Earnings Conference Call Transcript (BLS)*, at 15 (July 24, 2006).

migrate that into some small business customers. I think their focus will be on the smaller customers, kind of ten lines and under probably four to six lines and under frankly, and when you look at that with respect to our business, that total is only at about the mid single-digits range of our total business. So, it's a sub-segment of the market we go after in small, medium business.”⁶¹

Analysts believe that, because of the difficulties and barriers to fiber loop deployment, it will be difficult for cable companies to substantially penetrate the market for businesses that demand fiber-based DS-1 and DS-3 services. To the extent that cable companies serve the business market, they will reportedly need to rely on other carriers' facilities, just as intramodal competitors do. Cable companies will need to “[s]titch[] together [networks] that reach through multiple providers” and this will require “multiple contractual arrangements.”⁶² Indeed, the head of Cox's business services division notes that Cox will be able to overcome its limited footprint only by interconnecting with other carriers. *Id.* Even if cable companies are able to deliver enterprise class services, they must overcome the apparent perception, carried over from their traditional HFC-based services, that their networks do not provide enterprise class reliability.⁶³

In sum, cable companies still have significant barriers to overcome in serving the DS-1 and DS-3 market to any substantial degree. Even if they could overcome these barriers in some locations in several years time with unforeseen technologies or unannounced network

⁶¹ See AT&T Corp., *AT&T Q3 Earnings Conference Call Transcript* (T), at 7 (Jan. 25, 2007).

⁶² Jim Duffy, *supra* note 59.

⁶³ According to market tracker Ovum/RHK “CIOs at large companies are less apt to trust their mission critical operations and network to cable companies which are relatively new entrants to the market and are not known for having networks with five nines of reliability...MSOs still have a long way to go to erase that perception and prove that they are every bit as capable as the big telcos.” *Id.* (quoting Ovum/RHK/s analyst Ken Twist).

expansions, such developments are irrelevant as to whether cable companies are “ready, willing and able” to serve enterprise customers today in the six MSAs within a “commercially reasonable time.” Finally, if cable companies do develop the ability to provide DS-1 or DS-3 circuits to businesses, the presence of a single facilities-based competitor would be insufficient to give Verizon “very strong market incentives” to offer DS-1 or DS-3 facilities to competitors in the downstream retail market, as McLeodUSA’s experience in Omaha demonstrates.

IV. VERIZON’S ADDITIONAL REQUESTS FOR RELIEF SHOULD BE DENIED.

Verizon’s request for forbearance from other common carrier requirements is no more meritorious than its request for the elimination of UNEs. In a footnote in each of its six petitions, Verizon seeks forbearance from dominant carrier tariffing requirements, price cap regulation, *Computer III* regulations including CEI and ONA requirements, dominant carrier rules under 214 and the rules concerning line acquisitions, discontinuing services, assignments or transfers of control and acquiring affiliations. *See, e.g., NY MSA Petition* n.3. Verizon barely even attempts to support these requests with evidence or reasoned argument.

Especially with respect to transmission services that CLECs require as an input to provide services to businesses, this request is completely unfounded. Verizon has not shown that its market power over facilities necessary to provide services to businesses in the six markets for which it seeks forbearance has significantly diminished over the past several years. As explained in Section III above, the available data indicates that Verizon continues to have overwhelming market power in the provision of local transmission facilities needed to serve business customers.

If Verizon’s request for relief from dominant carrier and other existing regulations were granted, the result is predictable. Removing all forms of price regulation from an entity with an over 90 percent market share of bottleneck transmission facilities will result in the elimination of competition that relies on such facilities. The Commission only need look at what has happened

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to McLeodUSA in Omaha to observe the likely outcome in the markets where Verizon seeks relief.

V. CONCLUSION.

For the reasons described herein, Verizon's petitions for forbearance should be denied.

Respectfully submitted,

/s/

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ATTORNEYS FOR TIME WARNER
TELECOM, CBeyond AND ONE
COMMUNICATIONS

March 5, 2007

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EXHIBIT A
[REDACTED]

REDACTED-FOR PUBLIC INSPECTION

EXHIBIT B

[REDACTED]

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CERTIFICATE OF SERVICE

I, Jonathan Lechter, do hereby certify that on this 5th day of March, 2007 a copy of the foregoing “Opposition of Time Warner Telecom Inc., Cbeyond Inc., and One Communications Corp.” was delivered by overnight express mail to the following parties:

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Washington, DC 20036

/s/

Jonathan Lechter

ATTACHMENT D

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

In the Matter of)	
)	
)	
Petitions of Qwest Corporation for Forbearance)	WC Docket No. 07-97
Pursuant to 47 U.S.C. § 160(c) in the Denver,)	
Minneapolis-St. Paul, Phoenix, and Seattle)	
Metropolitan Statistical Areas)	

**OPPOSITION OF TIME WARNER TELECOM INC., CBeyond INC., AND
ESCHELON TELECOM, INC.**

WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
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August 31, 2007

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
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**OPPOSITION OF TIME WARNER TELECOM INC., CBeyond INC., AND
ESCHELON TELECOM, INC.**

Time Warner Telecom Inc. (“TWTC”), Cbeyond Inc. (“Cbeyond”) and Eschelon Telecom, Inc. (“Eschelon”) (collectively, the “Joint Commenters”), by their attorneys, hereby submit this opposition to four petitions for forbearance from unbundling and other regulations filed by Qwest Corporation (“Qwest”) in the above referenced docket.¹ As discussed below, the Joint Commenters oppose the Qwest petitions to the extent that those petitions seek forbearance from unbundling and other regulations governing access to Qwest local loop and transport facilities needed to serve business customers.²

¹ See *Pleading Cycle Established for Comments on Qwest’s Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Public Notice, 22 FCC Rcd. 10126 (WCB rel. June 1, 2007).

² Unlike its petition for forbearance for Omaha, Qwest does not explicitly request forbearance from dominant carrier regulation governing its provision of special access services in the four MSAs at issue in this proceeding. The Joint Commenters have not therefore addressed the need for dominant carrier regulation for special access services in this opposition. Nevertheless, if the

I. INTRODUCTION AND SUMMARY.

In its petitions for forbearance from unbundling and dominant carrier regulation in Denver, Minneapolis, Phoenix and Seattle, Qwest expresses what is no doubt a sincere desire that the Commission cease regulating Qwest's local loop and transport facilities. But Qwest offers virtually nothing in support of this request except empty rhetoric and assertions that are plainly unpersuasive or irrelevant. In fact, by any measure, Qwest retains overwhelming market power over the DS-0, DS-1 and DS-3 loops and in many cases, DS-1 and DS-3 interoffice transport facilities, needed to serve business customers in the four MSAs in question. If the Commission were to deregulate Qwest in the provision of these services, Qwest would be free to act on its powerful incentives to increase wholesale prices, drive competitors from the market and deprive business customers of the lower prices and innovation yielded by competitive markets. The Commission must therefore deny the petitions at least as they pertain to loop and transport facilities needed to serve business customers.

To begin with, there is little doubt that Qwest owns the only local transmission facilities serving the vast majority of commercial buildings in the four MSAs at issue. This is true even when cable companies and other intermodal providers are accounted for. For example, the GAO concluded that competitors have deployed loop facilities to only 5.7 percent of the commercial buildings with demand of DS-1 or greater in Minneapolis, 3.7 percent of such buildings in

Commission were to somehow read the petitions as encompassing a request for the elimination of dominant special access carrier regulation (and it is hard to see how it could do so), all of the information provided herein demonstrates that dominant carrier regulation remains essential to constrain Qwest's exercise of market power in the provision of special access services in the four MSAs for which Qwest has sought forbearance.

Phoenix and 3.8 percent of such buildings in Seattle. While the GAO did not include Denver in its study, Qwest has offered no basis for concluding that there is more competition there than in the other three MSAs.

The data available regarding intramodal competitors' deployment of loop facilities needed to serve business customers confirms Qwest's dominance in all four MSAs at issue. For example, TWTC focuses on serving large and medium-sized business customers, and it constructs loops wherever possible. Nevertheless, TWTC has only been able to construct its own loops to [proprietary begin] [proprietary end] of the commercial buildings in Denver, [proprietary begin] [proprietary end] of the commercial buildings in Minneapolis, [proprietary begin] [proprietary end] of the commercial buildings in Phoenix, and [proprietary begin] [proprietary end] of the commercial buildings in Seattle.

Moreover, there is no basis for concluding that intramodal competitors can reduce Qwest's overwhelming dominance over loop facilities in the foreseeable future. Based on a detailed study of the commercial buildings in the four MSAs at issue, TWTC determined that, even under favorable conditions, it is theoretically possible for it to deploy loops to only [proprietary begin] [proprietary end] of the commercial buildings in Denver to which TWTC has not already deployed loops and that have two DS-1s of demand or greater, [proprietary begin] [proprietary end] of such buildings in Minneapolis, [proprietary begin] [proprietary end] of such buildings in Phoenix, and [proprietary begin] [proprietary end] of such buildings in Seattle. Other

competitors are likely to face the same barriers to expanding their network footprint and are therefore likely to be as limited in their prospects for growth as TWTC.

Nor is there any basis for concluding that cable companies or any other intermodal competitors serving Denver, Minneapolis, Phoenix or Seattle have achieved or could achieve a significant level of success in serving business customers. The clearest indication of cable operators' presence in the business market is the extent to which competitors like Eschelon and Cbeyond have lost customers to cable operators. Yet both companies' churn data, described in detail herein, demonstrates that cable operators are simply not competing in the provision of services to small and medium-sized business customers in the four MSAs at issue. Moreover, the limitations of the geographic reach and technical capabilities of the cable operators' networks, as the Commission has recognized, constrain their ability to serve business customers in the future.

Given the absence of facilities-based competition, it is clear that Qwest cannot meet the Section 10 standard for forbearance. Unbundling requirements are necessary to ensure that Qwest's business retail and wholesale rates are just and reasonable, that consumers are protected against the abuse of Qwest's market power and that the public interest is served. Qwest's conduct in Omaha is obviously a cautionary tale in this regard. As McLeodUSA has explained, Qwest has exploited its new freedom from regulation in that market to increase the prices McLeodUSA pays for DS-0 and DS-1 loops, making it apparently impossible for McLeodUSA either to sustain its presence in the market or even to sell its assets in the market. Absent intramodal competition from McLeodUSA or similarly situated carriers, Omaha businesses will likely have no alternative to Qwest or those businesses lucky enough to have Cox as an

alternative will be forced to purchase service in a duopoly market. As the Commission has recognized, Section 10 forbearance is inappropriate in markets characterized by such conditions.

Competition and consumer welfare in the four MSAs at issue here will suffer the same fate if the instant petitions are granted. For example, Eschelon conducted a study to determine the consequences of forbearance in all four of these markets. Based on the conservative assumption that the elimination of unbundling would cause Qwest to require that Eschelon pay Qwest's special access prices for DS-1 loops applicable under Qwest's standard discount plan and Qwest's post-forbearance Omaha price for DS-0 loops, Eschelon determined that it would be placed in an unsustainable price squeeze. In all four markets, Eschelon would experience

[proprietary begin] [proprietary end] for services it provides via DS1 EEL and DS-0 loops and would experience [proprietary begin]

[proprietary end] for services it provides via stand-alone DS1 loops. Moreover, forbearance would also enable Qwest to unilaterally increase prices for transport facilities because, as discussed herein, Eschelon's study of the wholesale transport market in the four MSAs at issue reveals that Qwest is the only wholesale provider of transport in numerous central offices in which Eschelon is collocated. Accordingly, eliminating Qwest's unbundling obligations in the Denver, Minneapolis, Phoenix and Seattle MSAs is flatly inconsistent with sound public policy and the Section 10 standard.

II. THE COMMISSION MUST APPLY THE APPROPRIATE ANALYTICAL FRAMEWORK WHEN CONSIDERING THE QWEST FORBEARANCE PETITIONS.

In its petitions, Qwest seeks forbearance from, among other things, loop and transport unbundling. Under Section 10, forbearance shall be granted only where (1) a legal requirement

is no longer necessary to ensure the “charges, practices” and “classifications” of service offered by a carrier are just, reasonable, and not unjustly or unreasonably discriminatory; (2) the legal requirement is no longer necessary for the protection of consumers; and (3) a grant of forbearance comports with the public interest.³ In assessing forbearance petitions similar to the ones at issue here, the Commission has focused on whether competition is sufficient to satisfy this standard in the absence of the unbundling obligations for which forbearance is sought.⁴ In conducting this analysis with regard to the four petitions at issue in this proceeding, the Commission must utilize appropriate geographic and product markets, and it must grant forbearance only where sufficient facilities-based competition has taken root in the relevant market. In this regard, the Commission’s unbundling analysis in particular must be informed by its own precedent, its past mistakes in granting forbearance based on predictive judgments that have been proven to be incorrect, and sound competition policy.

First, there is now little controversy that the appropriate geographic market for reviewing petitions for forbearance from unbundling local transmission facilities is no larger than individual wire centers. The Commission adopted wire centers as the geographic market for assessing unbundled network element (“UNE”) loop forbearance petitions in both Omaha and Anchorage. *See Omaha Order* ¶¶ 60-61; *Anchorage Order* ¶¶ 14-16. In both *Orders*, the

³ 47 U.S.C. § 160(a)(1)-(3).

⁴ *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415, ¶ 1 (2005) (“*Omaha Order*”); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd. 1958, ¶¶ 27-30 (2007) (“*Anchorage Order*”).

Commission rejected ILEC requests that it utilize a larger geographic area. There is no basis for departing from this approach here. The large geographic areas covered by the four MSAs for which Qwest seeks forbearance all appear to contain “substantial topographical and density variations” and are not subject to uniform levels of competitive entry. *Anchorage Order* ¶ 15.

Second, it is critical that the Commission adopt and consistently utilize appropriate product markets for its analysis. This means that the Commission should assess the extent to which competition, including intermodal competition, exists with regard to “each loop type”⁵ and each transport type. As the Commission stated in the *Anchorage Order*, this “remains the best way to structure [the] forbearance analysis.” *Id.* ¶ 13. In conducting each product-specific analysis, the Commission has appropriately emphasized the need to analyze the extent to which competitors can provide services that are “substitutes” for ILEC services in the absence of UNEs. *See Omaha Order* ¶ 65. This means that the Commission must separately analyze the extent to which facilities-based competition exists at both the retail and wholesale levels for the services that ILECs provide *via* DS-0 loops (including xDSL services demanded by small business customers), DS-1 loops, and DS-3 loops as well as DS-1 and DS-3 transport.

It is of course not enough to describe the appropriate geographic and product markets. The Commission must actually conduct a separate analysis for each relevant market as appropriate. Unfortunately, the Commission failed to do so in either the *Omaha Order* or *Anchorage Order*. For example, in the *Omaha Order*, the Commission relied on aggregate

⁵ *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 210 (2005) (“*TRRO*”).

numbers of DS-0, DS-1 and DS-3 circuits sold by competitors to businesses across the nine wire centers in which it granted forbearance. *See id.* ¶ 69. But aggregate data across multiple wire centers offers no basis for granting forbearance in any particular wire center where competition for one or all of these circuits could be non-existent or *de minimis*. Similarly, in both the *Omaha Order* and the *Anchorage Order*, the Commission relied on aggregate data regarding cable network coverage for both residential and business customers (*see Omaha Order* ¶ 69; *Anchorage Order* ¶ 21), but such average data offers no reliable indication of a cable operator's network coverage for either the circuits demanded by residential customers or the circuits demanded by business customers. Furthermore, the Commission relied on Cox Communications Inc.'s ("Cox's") success in the residential market as a basis for predicting that it would have similar success in the business market (*see Omaha Order* ¶ 66), without offering any basis for concluding that this would be the case. The conflation of separate markets in this manner is flatly inconsistent with the Commission's stated objective of separately analyzing the extent to which competitors' facilities, and the services they provide over those facilities, comprise "substitutes" of "each loop type" for which forbearance was sought. The Commission must not repeat this mistake in the instant proceeding.

Third, forbearance should not be granted in any relevant market unless facilities-based competitors' *end user connections* within such market are ubiquitous enough to ensure that Qwest's price and non-price conduct will be disciplined absent unbundling obligations or dominant carrier regulation. For example, in both the *Omaha Order* and *Anchorage Order*, the Commission granted forbearance from Section 251(c)(3) unbundling obligations only in wire centers in which at least one intermodal competitor was offering service over its own "extensive

last mile facilities.” *Omaha Order* ¶ 59; *see also Anchorage Order* ¶ 31 (applying “extensive” intermodal coverage standard because of “the importance facilities-based last-mile deployment plays in lessening the need for regulatory intervention”). The Commission has concluded that granting forbearance in wire centers “where no competitive carrier has constructed substantial competing ‘last mile’ facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition.” *Omaha Order* ¶ 60.

The Commission’s measure for determining whether an intermodal competitor’s last mile facilities have achieved “extensive” or “substantial” presence in a wire center and in a product market is the “coverage” of end users. That is, a particular customer location is deemed to count toward the requirement of “extensiveness” or “substantiality” only where the intermodal competitor “uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC’s local service offerings.” *Omaha Order* n.156; *see Anchorage Order* ¶ 32 (applying coverage standard). Accordingly, an intermodal competitor’s network does not “cover” a customer location unless the competitor is able to serve that location with the full range of services offered in the relevant product market in a timeframe that is equal to or less than the time it takes for a reasonably efficient competitor to provide such services. Furthermore, the intermodal competitor must have substantial enough coverage in the wire center that “all of the customers capable of being served by [the ILEC] from [a] wire center will benefit from competitive rates.”⁶

⁶ *Omaha Order* ¶ 69. In the *Anchorage Order*, the Commission inexplicably seemed to depart from this standard and concluded that GCI’s network covered customer locations that GCI would

But ubiquitous “coverage” by a single intermodal competitor by itself is not enough to meet the requirements of Section 10 for either the retail or the wholesale market. The Commission has held that the Section 10 standard is only met in the retail market if the intermodal competitor has demonstrated substantial success in winning retail market share by providing services over its own network. *See Omaha Order* ¶ 64, n.177, ¶ 69; *see also Anchorage Order* ¶ 28.

Moreover, in the *wholesale* market, a single facilities-based competitor is insufficient to meet the requirements of Section 10. As the Commission explained, it is critical that facilities-based wholesale competition “minimize[] the risk of duopoly and of coordinated behavior or other anticompetitive conduct.” *See Omaha Order* ¶ 71; *see also Anchorage Order* ¶ 46 (relying on continued rate regulation of ACS to prevent the development of “an impermissible duopoly”). To ensure this outcome, the record must support the conclusion that there is enough facilities-based wholesale competition so that the ILEC has “very strong market incentives” to offer loops and transport on a wholesale basis to competitors on terms and conditions that allow efficient competitors to compete even if UNEs are eliminated. *Omaha Order* ¶ 81; *see Anchorage Order* ¶¶ 39-42 (relying on continued regulation to assuage concerns regarding the adequacy of

only be able to serve after it completed its network upgrade, which will take one-to-two years. *See id.* ¶ 36, n.114. Incredibly, the Commission even went so far as to suggest to GCI ways in which it could serve customers over its existing facilities. *See id.* n.122. Nevertheless, later in the *Anchorage Order*, the Commission candidly expressed “concerns” that, in fact, GCI “is unable to provide symmetric high-speed service over its cable plant or otherwise unable to provide particular services to particular customers.” *Id.* ¶ 41. In any event, the Commission emphasized that market conditions and GCI’s participation in the market in Anchorage are “unique.” *Id.* Thus, the Commission’s arbitrary finding that GCI “covers” customer locations that it cannot serve for one or two years should have no bearing on the instant petitions.

competition in Anchorage). In determining whether this is the case, the Commission may not infer from the presence of a cable operator's loop and transport facilities that others could deploy such facilities.⁷ The Commission also may not rely on the availability of special access or Section 271 UNEs as a basis for eliminating UNEs. *See TRRO* ¶¶ 46-63.

Again, the Commission must consistently apply these standards. It has not done so in the past. For example, rather than conduct an analysis of the competitiveness of the wholesale market in Omaha, the Commission relied on a baseless "predictive judgment" that the presence of a single competitor—a cable operator—with limited network coverage among business customers would give Qwest the incentive to offer competitors access to DS-0, DS-1 and DS-3 loops and DS-1 and DS-3 transport needed to serve business customers on reasonable terms and conditions that would support efficient competitive entry. Not surprisingly, this predictive judgment has proven to be incorrect, as explained in Section IV.A *infra*. McLeodUSA's experience in Omaha since the elimination of UNEs illustrates the need for the Commission to ensure that higher levels of facilities-based wholesale competition exist than was the case in Omaha before eliminating unbundled loops and transport needed to serve businesses.

Finally, the Commission must ensure that interested parties have a meaningful opportunity to assess and comment on data regarding facilities-based entry in the relevant markets. As explained below, Qwest offers little of substance to support its petitions. This is in

⁷ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order, 18 FCC Rcd. 16978, ¶ 310 (2003), *subsequent history omitted* ("TRO") (deployment of facilities by intermodal competitors that benefit from "unique" advantages is largely irrelevant to whether other competitors could efficiently deploy the similar facilities).

part due to the paucity of competition in the relevant markets. But the Commission will likely seek information from the few facilities-based competitors, in particular, cable companies, as part of its assessment of the merits of the Qwest petitions. If so, the Commission must ensure that such information is made available to interested parties soon enough that companies and their outside experts have a meaningful opportunity to analyze that information and submit that analysis into the record. The D.C. Circuit has consistently held that failing to make critical factual information available to interested parties on a timely basis in a rulemaking proceeding violates the requirements of the Administrative Procedure Act (“APA”), *see* 5 U.S.C. § 553(c), and is reversible error. *See, e.g., Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 13-14 (D.D.C. 2004) (citing *Conn. Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982); *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (same); *Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (same).

III. BY ALL AVAILABLE MEASURES, QWEST RETAINS OVERWHELMING MARKET POWER OVER LOCAL TRANSMISSION FACILITIES NEEDED TO SERVE BUSINESS CUSTOMERS.

The available evidence demonstrates that Qwest continues to control the only viable transmission facility for serving the vast majority of business locations in its territory. This is true, even if one accounts for both intramodal and intermodal (including cable) competitors. Moreover, Qwest has offered no basis in its petitions to doubt that this is the case with regard to any wire center in the four MSAs at issue in which it is still obligated to provide unbundled DS-0, DS-1 or DS-3 loops or DS-1 or DS-3 transport needed to serve business customers. Even in the small business market, in which cable companies have apparently made some modest competitive entry by offering substitutes for services such as xDSL that rely on DS-0 unbundled

loops, there is no evidence that a viable wholesale market would exist if unbundled DS-0 loops were eliminated.

Qwest's control of bottleneck local transmission facilities (loops and transport) demonstrates that the continued availability of unbundled DS-0, DS-1 and DS-3 unbundled loops and DS-1 and DS-3 transport is (1) "necessary to ensure that the charges, practices," and "classifications" of services provided to small, medium and large businesses in the six markets at issue are "just, reasonable" and "not unjustly or unreasonably discriminatory;" and (2) "necessary for the protection of consumers" against higher prices charged by Qwest and foregone competition and innovation from UNE-based competitors. Denial of Qwest's request for UNE forbearance is also in the public interest for the similar reason that granting the request would lead to less competition, higher prices and less innovation for all business customers in all of the markets in which Qwest seeks this relief.

A. The GAO And The FCC Itself Have Concluded That There Is No Basis For Granting Qwest's Petitions For Forbearance From Unbundling Loops Or Transport Needed To Serve Businesses.

The Government Accountability Office ("GAO"), in a recent report on the market for dedicated access services, and the FCC, in the *TRO*, *TRRO* and to some extent in the recent *Qwest Sunset Order*, have examined the competitiveness of the local transmission market generally, and in the Qwest region specifically. Both of these agencies have reached the same conclusion: Qwest has overwhelming market power over the upstream loop and transport inputs needed to serve small, medium and large business customers. Importantly, both the GAO's and FCC's conclusions accounted for the presence of cable, wireless and other intermodal competitors.

In a November 2006 report, the GAO determined that competitors have deployed few facilities in Qwest's markets or nationwide. The report found that, based on data from third-party telecommunications industry data vendors GeoResults and Telcordia, competitors have deployed transmission facilities to less than five percent of the buildings demanding at least DS-1 level service in the 16 markets studied.⁸ As the GAO found, nearly all of the loops that competitors have deployed are well above the DS-1 level of capacity. In light of long-standing entry barriers, the GAO concluded that "wireline facilities-based competition itself may not be a realistic goal for some segments of the market for dedicated access Where demand for dedicated access is less than 3 or 4 DS-1's [sic], it would appear unlikely that any competitor would extend its network for that business." *GAO Report* at 42. Moreover, the GAO emphasized that its study took into account *both intramodal and intermodal competition* (including cable companies and wireless providers). *See id.* at 47.

The GAO studied three of the four Qwest MSAs at issue here. It found that competitors had deployed loop facilities to only to 5.7 percent of the commercial buildings with demand of DS-1 or greater in Minneapolis, 3.7 percent of such buildings in Phoenix, and 3.8 percent of such buildings in Seattle. *Id.* at 20. As the GAO explained, most of the loops deployed by competitors provide two DS-3s or higher of capacity. As a result, competitors likely have deployed loops to well below 5.7, 3.7, and 3.8 percent of the customer locations in Minneapolis,

⁸ See *GAO, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 22 (Washington, D.C., Nov. 2006) ("*GAO Report*"). The GAO acknowledged that GeoResults data could overcount or undercount the number of buildings served by CLECs and one "price-cap incumbent" suggested that GAO may be undercounting by as much as 30 percent. Even if this were the case, "competitive alternatives exist in a relatively small subset of buildings." *Id.*

Phoenix, and Seattle, respectively, that are most relevant to this proceeding—those with demand of a single DS-3 of capacity or less.

Of course, the FCC reached very similar conclusions regarding ILECs' market power in the *TRO* and the *TRRO*. In the *TRO*, the Commission found that competitors had deployed loop facilities to only three to five percent of the commercial buildings nationwide.⁹ Moreover, in the *TRRO*, the FCC found that it is “rarely if ever economic” for a reasonably efficient competitor to construct DS-1 loops in the vast majority of wire centers in the country. *TRRO* ¶ 166. And, as Qwest itself has recently acknowledged, the Commission took into account “the role of intermodal competition” in the *TRRO*.¹⁰

As if the findings of the GAO Report, *TRO*, and *TRRO* were not proof enough, as recently as March 2007, in the *Qwest Sunset Order*,¹¹ this Commission held that Qwest retains a monopoly over essential local transmission facilities:

Qwest has failed . . . to present persuasive evidence that it no longer possesses exclusionary market power within its region as a result of its control over ubiquitous telephone exchange service and exchange access network. We therefore assume, for the purposes of this proceeding, that Qwest continues to possess exclusionary market power within its region by reason of its control over these bottleneck access facilities.

⁹See *TRO* ¶ 298 n.856 (stating that both “competitive LECs and incumbent LECs report that approximately 30,000, *i.e.*, between 3% to 5%, of the nation’s commercial office buildings are served by competitor-owned fiber loops”).

¹⁰ See Comments of Qwest Communications Int’l, Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Dkt. No. 05-25, at 7 & n.13 (filed Aug. 8, 2007) (citing *TRRO*).

¹¹ *In the Matter of Petition of Qwest Communications, Int’l Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd. 5207, ¶ 47 (rel. Mar. 9, 2007) (“*Qwest Sunset Order*”).

Id. ¶ 47 (citing *LEC Classification Order*, 12 FCC Rcd. 15756, 15762-63, ¶ 134 (1997)).

Qwest has offered no basis in the instant petitions for the Commission to question the validity of this conclusion in the four markets in which Qwest seeks forbearance.

B. Qwest Has Not, And Cannot, Demonstrate That Facilities-Based Competition From Intramodal Competitors In Any Wire Center Within The Four MSAs Is Sufficient To Justify Forbearance.

The available evidence concerning the extent to which intramodal competitors,¹² considered separately from intermodal competitors, have or could deploy their own loop or transport facilities confirms that continued availability of unbundled DS-0, DS-1 and DS-3 loops and DS-1 and DS-3 transport is necessary to ensure that business services are offered on terms and conditions that are just, reasonable and not unjustly or unreasonably discriminatory. This is particularly true with regard to the specific MSAs for which Qwest seeks forbearance.

1. The Joint Commenters' And Other Intramodal Competitors' Experiences Demonstrate That They Are Unable To Deploy The Loops Or Transport Facilities For Which Qwest Seeks Forbearance

The Joint Commenters' attempts to self-deploy loop and transport facilities underscores Qwest's continued dominance in the market for loop and transport facilities capable of serving business customers. Qwest derives its market power from the combination of its first-mover advantage of having sunk the investment in loop and transport facilities while competitors "face substantial operational barriers to constructing their own facilities." *TRRO* ¶ 151. As Stephanie Pendolino, TWTC's Director of Business Intelligence Reporting & Analytics, explains in her

¹² See *TRO*, Separate Statement of Commissioner Kathleen Q. Abernathy, at 3 (defining intramodal competition as "competitive LECs using their own facilities and incumbents' loops and subloops").

declaration, a competitor can overcome the relevant entry barriers where the revenue opportunity in a building is sufficient to cover the total cost of construction and recurring expenses and at the same time, achieve a reasonable rate of return on investment.¹³ These costs vary based on, among other things, (1) the proximity of a given customer location to TWTC's transport network (the longer the lateral facility, the higher the deployment cost); (2) costs associated with obtaining access on reasonable terms and conditions to poles, ducts, conduits, rights-of-way and commercial buildings; (3) the type of services provided (electronics for higher capacity services generally cost more than those for lower capacity services); and (4) the customer's willingness to enter into a long-term contract. *See id.* Under the best of circumstances, competitors can generally overcome these barriers for customers that purchase multiple DS3s of capacity pursuant to multi-year contracts or Ethernet services yielding similar revenue opportunities.¹⁴ Similarly, it is not efficient for competitors to deploy transport facilities along routes that do not support sufficient traffic volumes and their associated revenue opportunities. Kunde Dec. ¶ 5. Moreover, as David Kunde, Eschelon's Executive Vice President of Network Operations and Engineering, explains, "even if it were theoretically rational to construct loop or transport facilities, there are numerous obstacles associated with large-scale loop or transport self-deployment, including lack of space in existing conduits and municipalities' increasing

¹³ *See* Declaration of Stephanie Pendolino On Behalf Of Time Warner Telecom Inc. ¶ 5 (attached hereto as Attachment A) ("Pendolino Dec.").

¹⁴ *See id.* ¶¶ 5-6; *see also* Declaration of David A. Kunde On Behalf Of Eschelon Telecom, Inc. ¶ 5 (attached hereto as Attachment B) ("Kunde Dec.").

unwillingness to permit access to public rights-of-way already overburdened by other utilities.”
Id.

For these reasons, even TWTC, which serves predominantly medium and large businesses and likely deploys loop facilities at a faster pace than any other competitor, is unable to deploy loops to the vast majority of its customer locations. Nationwide, legacy TWTC (excluding Xspedius) served approximately 27 percent of its customer locations on-net as of September 2006. The circumstances are no better in the relevant Qwest MSAs. Indeed, Ms. Pendolino states that TWTC has been able to deploy its own loop facilities to only [proprietary begin] [proprietary end] of its customer locations in Seattle, [proprietary begin] [proprietary end] of its customer locations in Minneapolis,¹⁵ [proprietary begin] [proprietary end] of those in Denver, and a mere [proprietary begin] [proprietary end] of customer locations in Phoenix. *Id.* Furthermore, TWTC has deployed loop facilities to a miniscule segment of the aggregate commercial buildings in each MSA, as counted by GeoResults. *Id.* TWTC has constructed loops to a mere [proprietary begin] [proprietary end] of the commercial buildings in the Denver MSA, [proprietary begin] [proprietary end] of the commercial buildings in the Minneapolis MSA, [proprietary begin] [proprietary end] of those in the Phoenix MSA, and [proprietary begin] [proprietary end] of those in the Seattle MSA. *Id.*

¹⁵ As Ms. Pendolino explains, TWTC serves fewer customer locations in Minneapolis than in most of TWTC’s other markets. *See* Pendolino Dec. ¶ 5. This has caused the percentage of TWTC’s on-net buildings in that market to be unusually high. As explained below, however, TWTC has not and could not build its own loop facilities to the overwhelming majority of the commercial buildings in Minneapolis.

Beyond those buildings to which TWTC has already self-deployed loops, there are few locations to which it is even *theoretically possible* to construct loops in the future. *Id.* ¶ 8. For example, TWTC conducted a study to identify such buildings in the Denver, Minneapolis, Phoenix, and Seattle MSAs. As Ms. Pendolino explains, this build-buy analysis is based on the assumptions that: (1) TWTC must earn an approximate monthly recurring revenue (“MRR”) of [proprietary begin] [proprietary end] (*i.e.*, the amount required to reach the company’s target on-net building rate of return over a 36-month period beyond expected deployment costs) (*see id.* ¶ 6); and (2) TWTC can capture [proprietary begin] [proprietary end] percent of the revenue opportunity in a commercial building— a conservative estimate since TWTC is often unable to capture this level of demand in a building. *See id.* ¶ 7. TWTC relied on GeoResults data estimating the potential revenue spend in the commercial buildings with two DS-1s of demand or more in the four MSAs in question to determine the percentage of such buildings to which it has not constructed its own loops (“non-TWTC buildings”) but to which it might ultimately be able to do so. *See id.* ¶ 8. The results of this analysis are that TWTC *might, under favorable circumstances*, be able to serve only [proprietary begin] [proprietary end] of non-TWTC buildings in Denver, [proprietary begin] [proprietary end] of non-TWTC buildings in Minneapolis, [proprietary begin] [proprietary end] of non-TWTC buildings in Phoenix, and [proprietary begin] [proprietary end] non-TWTC buildings in Seattle. *Id.* Ms. Pendolino explains that these results assume that the various barriers to entry described above are overcome (which is anything but certain), but it does not account for the fact that TWTC cannot even begin building its own

loops unless and until potential customers in a particular building actually commit to purchasing the high revenue services that support loop construction. *See id.* ¶ 9.

In the many commercial buildings and business locations to which loop self-deployment is not economic, there is almost never a non-ILEC wholesale provider of loop connectivity. Even many transport routes lack a single non-ILEC source of wholesale transmission. Competitors' experience is therefore that they have no choice but to purchase from Qwest in the four MSAs that are the subject of the Qwest forbearance petitions.

For instance, Cbeyond relies exclusively on Qwest DS-1 unbundled loops or enhanced extended links ("EELs") to serve its small and medium-size business customers cost-effectively.¹⁶ In addition, Mr. Kunde states that, despite Eschelon's preference to purchase loops and transport from non-ILEC wholesale providers, "the marketplace reality is that few such alternatives exist." Kunde Dec. ¶ 6. Eschelon relies exclusively on Qwest loops to serve business customers in the four MSAs at issue. *See id.* In addition, Mr. Kunde observes that numerous Eschelon collocations cannot be served by a non-ILEC wholesale transport provider, particularly in the Denver and Phoenix MSAs. *See id.* In the Phoenix MSA, Eschelon is collocated in [proprietary begin] [proprietary end] central offices, but Eschelon has been unable to identify a single wholesale transport provider other than Qwest in [proprietary begin] [proprietary end] of those central offices.¹⁷ Similarly, in Denver, Eschelon

¹⁶ *See* Declaration of Richard J. Batelaan On Behalf Of Cbeyond, Inc. ¶ 4 (attached hereto as Attachment C) ("Batelaan Dec.").

¹⁷ *See* Kunde Dec. ¶ 6 & Exhibit 1 (attached thereto) (listing these [proprietary begin] [proprietary end] central offices).

has been unable to identify a single non-ILEC wholesale transport provider in [proprietary begin] [proprietary end] of those central offices in which Eschelon is collocated.¹⁸ In those locations where TWTC cannot deploy its own loop facilities, it is also forced to rely on Qwest's facilities to serve its enterprise customers. As Ms. Pendolino explains, this is because "Qwest usually owns the only loop facility serving locations to which TWTC cannot efficiently deploy its own facilities." Pendolino Dec. ¶ 10.

The Joint Commenters' experience is typical. Nearly every one of the intramodal competitors cited by Qwest as competing for enterprise customers in the four MSAs in question has stated that it cannot deploy loop facilities at the DS-1 level and, in most cases, they can only deploy loops at locations that demand multiple DS-3s of capacity. Moreover, as they indicated, many of these carriers rely heavily on UNEs, not special access facilities. Intramodal carriers operating in the four MSAs at issue generally restrict their purchase of special access to circumstances in which UNEs are unavailable due to the operation of the *TRRO* impairment triggers or where Qwest rejects UNE orders due to the purported absence of facilities or some other excuse.¹⁹ If forced to rely exclusively on special access facilities, many (probably most) of

¹⁸ See *id.* & Exhibit 2 (attached thereto) (listing these [proprietary begin] [proprietary end] central offices).

¹⁹ Indeed, the experience of many of these carriers with respect to the BOCs' unlawful manipulation of the UNE rules formed the basis for the FCC to reject the use of special access as a substitute for UNEs in the *TRRO*. See, e.g., *id.* ¶ 64 ("In short, in many cases, it appears that carriers expected to transition to UNEs – and pursued business models relying on this eventuality – but committed to long-term special access contracts in the interim.") (internal citations omitted).

these carriers would have to exit the market. The relevant intramodal competitors' market experiences are as follows.

- AT&T:
 - AT&T cannot serve two DS-3s or less of capacity unless the location is within 88 feet of its network splice point. *See* AT&T Comments, WC Dkt. Nos. 04-313 et al., at 36 (filed Oct. 4, 2004).
 - AT&T can only reach ten percent of its target market with its own loop facilities. *See* AT&T *ex parte* presentation, CC Dkt. No. 01-338 (filed Jan. 7, 2003).
 - Where AT&T must rely on ILEC special access as an input, it cannot offer Ethernet service profitably at retail. AT&T Comments, WC Dkt. Nos. 04-313 et al., Attach. B, Benway et al. Declaration ¶ 103 (filed Oct. 4, 2004).
- Broadwing
 - It is never economical for Broadwing to deploy its own loop facilities. Broadwing WC Dkt. 05-25, at 11 (filed June 13, 2005).
 - The ILECs maintain a near monopoly over the DS-1 loop facilities that Broadwing demands. *Id.*
- Cavalier
 - Construction of loops in urban areas is often prohibitively expensive and Cavalier will only construct such facilities if there is demand for "several DS-3 circuits" at a particular location. ALTS et al. Comments, App. I, Declaration of Brad A. Evans, WC Dkt. Nos. 04-313 et al., ¶ 20 (filed Oct. 4, 2004).
 - Cavalier experiences rejections for UNE orders from Verizon at a rate of 23 percent for DS-1 loops and 79 percent for DS-3 loops. *Id.* ¶ 22.
- Covad
 - Covad has not deployed DS-1 loops and instead relies exclusively on the ILEC for such facilities. Covad Comments, Joint Declaration of Stephan Derodeff et al., WC Dkt. Nos. 04-313 et al., ¶ 44 (filed Oct. 4, 2004).
 - Covad only purchases special access when UNEs are unavailable and based on the presumption that these circuits can quickly be converted to

UNEs. Covad Reply Comments, WC Dkt. Nos. 04-313 et al., at 34 (filed Oct. 19, 2004). Typically, 35 to 40 percent of DS-1 UNE of Covad's orders are rejected by Verizon because facilities are "unavailable." Joint Letter of Covad et al., CC Dkt. Nos. 01-338 et al., at 2 (filed Aug. 9, 2004).

- Covad cannot profitably provide DS-1 services to business customers if forced to purchase all of its DS-1 services as special access. Special access prices are generally 150 to 250 percent higher than UNE prices. Covad Comments, Joint Declaration of Stephan Derodeff et al., WC Dkt. Nos. 04-313 et al., ¶ 45 (filed Oct. 4, 2004).
- In the NY MSA, the monthly rate for DS-1 transport is approximately 400 percent higher than the rate for DS-1 UNE transport. *Id.* ¶ 51.

➤ Level 3

- Level 3 "finds it largely impossible to find viable alternatives to ILEC special access services." Level 3 Opposition, WC Dkt. No. 05-333, at 10-11 (filed Jan. 23, 2006).

➤ Sprint

- As of the end of 2004, "Sprint relied upon the RBOC for almost 95 percent of its DS-1 circuits and 83 percent of its DS-3 circuits." Comments of Sprint, WC Dkt. No. 05-25, at 7 (filed June 13, 2005).

➤ XO

- Less than 25 percent of XO's DS-1 circuits are special access while more than 75 percent are purchased as UNEs. Tirado Declaration ¶ 44, attached to Joint Comments of the Loop and Transport CLEC Coalition, WC Dkt. No. 04-313 (filed Oct. 4, 2004) ("*Tirado Declaration*").
- If XO were forced to purchase exclusively special access DS-1s, it could not compete. XO Emergency Petition for Expedited Determination that CLECs are Impaired Without DS-1 UNE Loops, WC Dkt. Nos. 04-313 et al., at 30 (filed Sept. 29, 2004) ("*XO DS-1 Petition*").
- Even under term and volume commitment plans, XO must pay 20 percent to 300 percent higher for special access DS-1 and DS-3 loops than for UNEs. *Tirado Declaration* ¶ 42.
- It is almost never economic for XO to construct its own DS-1 facilities. *Id.* ¶ 21.

- XO has rarely been able to purchase DS-1 and DS-3 loop facilities from other CLECs. In XO's experience, CLECs offer DS-1 and DS-3 loops on a wholesale basis to fewer than five percent of the buildings that XO seeks to serve. *Id.*
 - It is never economic for XO to deploy DS-1 transport. *Id.* ¶ 35.
 - When XO orders special access, it never does so by choice, but it is often forced to do so because of Verizon's "no-facilities available" policy. *XO DS-1 Petition* at 31.
 - Verizon makes XO wait 90 days to convert a special access DS-1 to a UNE and one year to convert a special access DS-3 to a UNE. *Tirado Declaration* ¶ 47.
- Xspedius (now part of TWTC)
- "It is almost never economic for Xspedius to construct its own DS-1 wireline loop facilities." Declaration of James C. Falvey ¶ 26, attached to Joint Comments of the Loop and Transport CLEC Coalition, WC Dkt. Nos. 04-313 et al. (filed Oct. 4, 2004).
 - Xspedius generally requires at least 3 DS-3s of demand to construct a loop. *Id.* ¶ 23.
 - It would never be economic for Xspedius to deploy DS-1 transport facilities and Xspedius has never done so. *Id.* ¶ 29.

Furthermore, competitors' reliance on Qwest's loops and transport is only likely to increase in the future as customers increasingly demand that carriers serve most or all of their locations. As Ms. Pendolino explains, in the past, a ten-location customer may have required TWTC to serve only its two largest locations, but today, it is more likely that the customer will demand that TWTC serve all ten of its locations. *See Pendolino Dec.* ¶ 11. Although it may have been economically rational for TWTC to build loops to the customer's two largest locations (in both size and revenue generation), TWTC will in all likelihood be unable to construct loops to the smaller locations, which sometimes generate well below \$1000 in monthly revenue. *Id.*

TWTC's only alternative to reach those locations is Qwest's loop facilities. *Id.* Thus, as Ms. Pendolino explains, "in order to justify constructing loops to multiple customer locations, it is more and more important that TWTC be able to purchase loops from Qwest on reasonable terms and conditions." *Id.*

2. Qwest Provides No Evidence That Intramodal Competitors Are Able To Deploy The Loops Or Transport Facilities For Which It Seeks Forbearance.

Qwest relies on several sources of retail competition in an apparent attempt to demonstrate that the retail enterprise services market is "highly competitive."²⁰ This assertion is not credible, however, because each of the alleged sources of retail competition exists *precisely because of* CLECs' access to the very same unbundled loop and transport facilities that Qwest seeks to cease providing.

First, Qwest's reliance on the provision of retail services by CLECs relying on UNEs or resale is misplaced because such information offers no indication as to whether non-ILECs have or could compete using their own loops or transport.²¹ *Second*, neither "systems integrators" nor VoIP providers (*see, e.g.*, Qwest Minn. Pet. at 25-26) constitutes a facilities-based alternative to Qwest for retail business services because both are simply applications or systems that rely on local transmission facilities provided by a carrier (usually Qwest). *Third*, white pages listings

²⁰ *E.g.*, Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul Metropolitan Statistical Area, WC Dkt. No. 07-97, at 21 (filed Apr. 27, 2007) ("Qwest Minn. Pet.").

²¹ *See, e.g., id.; see also* Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Telecommunications Competition in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area, ¶ 23 (attached to Qwest Minn. Pet.) ("Brigham-Teitzel Minn. Dec.").

(*see, e.g., id.* at 23-24) and aggregate data on declines in Qwest's retail business lines (*see, e.g., id.* at 27-28) are equally irrelevant because there is no way to know how many of the competitors' customers represented in this data are served via Qwest's local transmission facilities or even whether the inputs for the services at issue are the same as those for which Qwest seeks forbearance (*i.e.*, DS-0, DS-1, or single DS-3 loops, and DS-1 or DS-3 transport).

Fourth, Qwest offers the number of fiber miles constructed by competitors and the number of buildings that such fiber serves as evidence of the existence of facilities-based competition. *See, e.g., Brigham-Teitzel Minn. Dec.* ¶ 10. But the mere presence of fiber deployed by competitors (*see, e.g., Qwest Minn. Pet.* at 26-27) is meaningless because each of the Joint Commenters, whose experience is typical of other competitors in the relevant MSAs, has stated that it cannot deploy loops to provide DS-1 or single DS-3 capacity service. Competitors have deployed a great deal of fiber that does not and cannot connect to end user locations. The existence of alternative local loops cannot therefore be inferred from the mere deployment of fiber near commercial buildings. As the Commission has held, data regarding the number of fiber route miles is an "unreliable" and "unsuitable" indicator of the level or likelihood of loop deployment. *See TRRO* ¶ 110. In fact, in defending the *TRRO* before the D.C. Circuit, the FCC estimated that only one-fifth of the thousands of transport route miles that the ILECs claimed were concentrated in areas where demand for high capacity facilities was greatest could actually be used to provide local services.²² There is every reason to think that Qwest has resorted to the same sort of overcounting in this proceeding.

²² *See* Brief for Respondents, *Covad Communications Co. v. FCC*, No. 05-1095, at 65 (D.C. Cir. filed Oct. 20, 2005).

In addition, Qwest relies on data from an entity called “GeoTel” for the propositions that “competitive fiber” now serves more than 1,300 buildings in Denver, 1,000 buildings in Minneapolis, 1,800 buildings in Phoenix, and more than 1,000 buildings in Seattle. *See, e.g.,* Brigham-Teitzel Minn. Dec. ¶ 10. However, unlike GeoResults, a vendor whose data regarding the provision of dedicated access services to commercial buildings are routinely used by wireline incumbents and competitors alike, the Joint Commenters are entirely unfamiliar with GeoTel. Moreover, Qwest fails to identify GeoTel or describe its experience and expertise in conducting studies for FCC proceedings such as this one. More importantly, Qwest fails to describe or provide the data or methodology that GeoTel relied upon to generate these seemingly inflated figures. Nor do the Joint Commenters or other parties have any independent means of verifying the reliability of such data. There is therefore no basis for the Commission to give any credence to conclusions purportedly reached by GeoTel.

Qwest’s discussion of Joint Commenters’ and other CLECs’ businesses and services is illustrative of Qwest’s failure to support its assertion that the market for loop and transport facilities is competitive. For instance, Qwest asserts that Eschelon’s offering of a VoIP service, “provided over its own managed network,” called Precision Flex-Pak, is evidence of retail competition in business services. *E.g.,* Brigham-Teitzel Minn. Dec. ¶ 28. However, this VoIP service and those offered by other CLECs cited by Qwest, including McLeodUSA (*id.* ¶ 30), Covad (*id.* ¶ 29), and XO (*id.* ¶ 33), depend upon the last-mile connectivity provided by Qwest. Indeed, as Mr. Kunde’s Declaration on behalf of Eschelon makes abundantly clear, Eschelon cannot economically deploy its own loop and transport facilities and instead relies on Qwest’s

loops and transport facilities to provide services to small and medium-sized businesses in the four MSAs at issue. *See* Kunde Dec. ¶¶ 5-6; *see also* Section III.B.1 *supra*.

Messrs. Brigham and Teitzel's discussion of Integra also does nothing to demonstrate the existence of the *facilities-based* retail competition needed to justify forbearance. *See, e.g.,* Brigham-Teitzel Minn. Dec. ¶ 27. To show "evidence" of such competition, Qwest points to a study conducted on behalf of Integra which estimated that "Qwest held 42% of the business market [in the Minneapolis MSA] while the combination of Comcast, Global Crossing (fka [sic] Frontier), Eschelon, AT&T, McLeod, Integra (prior to the [Electric Lightwave] acquisition), POPP, Verizon and Sprint held 30% of the business market." *Id.* The fact that Qwest's market share in Minneapolis is purportedly 42 percent (Qwest does not describe the methodology used to arrive at this percentage) of some undefined product market while the share of *nine other LECs combined* is 30 percent is not indicative of the extent to which Qwest controls the bottleneck local transmission facilities. Rather, Qwest's market share of the high capacity loops serving businesses below two DS-3s is the relevant issue in this proceeding. In addition, Messrs. Brigham and Teitzel's emphasis on Integra's increased revenues as a result of its acquisition of Eschelon (which is expected to close on August 31, 2007) ignores the fact that Eschelon relies exclusively on ILECs such as Qwest for loop facilities. Thus, Messrs. Brigham and Teitzel's statement that "Integra is well positioned with its acquisition of . . . Eschelon[] to make even greater inroads into the small business and enterprise business markets in the area" is both unfounded speculation and irrelevant. *Id.* The real question is whether the combined Integra-

Eschelon could somehow construct loop and transport facilities in the many locations in which no competitor can do so today. The answer is that they cannot.²³

C. Intermodal Competition In The Provision Of DS-1 Or DS-3-Based Services To Businesses In The Four MSAs In Which Qwest Seeks Forbearance Is Virtually Non-Existent.

There is simply no evidence that there is sufficient competition in the business market from cable competitors to meet the requirements of Section 10.

1. The Available Evidence Demonstrates That Cable Companies Are Not Competing Extensively In The Business Market.

All of the available information regarding the technical characteristics of cable networks, cable companies' entry thus far into the business market, and cable companies' plans to serve business customers indicate that competition from cable for all but the smallest business customers in the four MSAs at issue is limited and likely to remain so. *First*, as the FCC has concluded numerous times, cable companies' network location and architecture prevent them from providing DS-1 or DS-3 service on a widespread basis.²⁴ Cable plant typically passes

²³ Qwest also tries to argue that competitors' purportedly successful reliance on its wholesale UNE-platform "commercial" offer somehow demonstrates that UNE loops and transport are unnecessary in the four MSAs at issue. *See, e.g.*, Qwest Minn. Pet. at 17. But the so-called QPP/QLSP offer makes available switching services that are, unlike loops and transport, subject to widespread facilities-based competition. Moreover, competitors that rely on the QPP/QLSP purchase loops and transport as UNEs. The success or failure of competitors that purchase services under the QPP/QLSP is therefore irrelevant.

²⁴ As the Commission recognized in the *TRO*, because hybrid fiber coax ("HFC") networks generally do not serve businesses (*i.e.*, provide services such as DS-1s or DS-3s), "[t]he cable companies have remained focused on mass market, largely residential service consistent with their historic residential network footprints." *TRO* ¶ 52. In the *TRRO*, the Commission concluded that cable companies focus on selling cable modem services to "home offices or very small stand-alone businesses, neither of which typically requires high-capacity [DS-1 or DS-3] loop facilities." *TRRO* ¶ 193. At most, these services are substitutes for DS-0-based services.

primarily residences, and there are many businesses it does not pass. Kunde Dec. ¶ 7. Thus, while Qwest claims that Comcast has a “nearly ubiquitous network and therefore possesses ‘the necessary facilities to provide enterprise services’” (*e.g.*, Qwest Minn. Pet. at 23), competition from cable is only relevant to the extent that cable plant is build out directly to commercial buildings. Qwest has failed to show that this is the case generally let alone in the four MSAs that are the subject of its forbearance request.

Second, most businesses have thus far apparently viewed cable modem service as insufficient for their needs, because “bandwidth, security, and other technical limitations of cable modem service render it an imperfect substitute for service provided over DS-1 loops.” *TRRO* ¶ 193. In addition, the absence of cross elasticity of demand between cable modem service and DS-1 or DS-3 wireline broadband transmission facilities indicates that they are not substitutes for each other.²⁵

The Joint Commenters’ experience in the marketplace demonstrates the limited extent to which businesses view cable company offerings as substitutes to the DS-0, DS-1 and DS-3-based services offered by CLECs. As Richard Batelaan, Cbeyond’s Chief Operating Officer, explains in his declaration, while Cbeyond faces competition from both ILECs and other facilities-based CLECs that rely on UNEs in the SME market, “Cbeyond faces little, if any, facilities-based competition from cable operators or wireless companies.” Batelaan Dec. ¶ 5. In fact, in Denver, the only MSA of the four MSAs at issue in which Cbeyond offers service, Cbeyond lost a total

²⁵ See *TRRO* ¶ 193 (“Commenters also note that businesses that do require DS-1 loops are willing to pay significantly more for them than the cost of a cable modem connection, which also indicates that the two are not interchangeable. Finally, at least two competitors maintain that, based on their internal data, they rarely lose enterprise customers to cable providers.”).

of [proprietary begin] [proprietary end] to cable providers from January to May 2007. *Id.* ¶ 6. The average monthly cable churn rate for this five-month period was

[proprietary begin] [proprietary end]. *Id.*

Eschelon's experience is no different. As Mr. Kunde states, "[i]n my experience, intermodal alternate providers are not viable competitors to Eschelon and other [CLECs]."

Kunde Dec. ¶ 7. Eschelon's data reveals that from the first quarter of 2004 through the end of the second quarter of 2007, Eschelon lost a total of [proprietary begin]

[proprietary end] in the entire state of Colorado to Comcast. Similarly, Eschelon lost a total of

[proprietary begin] [proprietary end] in Minnesota and [proprietary begin]

[proprietary end] in Washington to Comcast during the same period. *Id.* The average quarterly churn rate for cable competition for the ten-quarter period was [proprietary

begin] [proprietary end] in Denver and Washington and [proprietary begin]

[proprietary end] in Minnesota. *Id.* In Arizona, from the first quarter of 2004 through the end of the second quarter of 2007, Eschelon lost a total of [proprietary begin]

[proprietary end] to Cox, but even this number represents a tiny fraction of Eschelon's customer base. In fact, Eschelon's average quarterly churn rate for cable competition over the ten-quarter period in Arizona was a mere [proprietary begin]

[proprietary end]. *Id.*

Moreover, the cable companies themselves agree that their ability to compete in the provision of DS-1 and DS3-based services is extremely limited. In the record of the *Anchorage Order* proceeding, GCI repeatedly explained that, "existing cable technology does not yet permit GCI to provide reliable or economical large-scale DS-1 level services to medium and large

business customers.”²⁶ As a result, GCI can only serve enterprise customers in Anchorage with its fiber plant, which is much less extensive than its HFC plant. Moreover, as explained in footnote 5, *supra*, the Commission essentially agreed with GCI that these limitations preclude GCI from providing a meaningful competitive alternative to the incumbent LEC in Anchorage.

Third, cable companies are unlikely to be able to commit to Service Level Agreements (“SLAs”) when providing service over their HFC networks to business customers. The Joint Commenters have found that offering an SLA is often a necessary prerequisite to serving a medium or large business customer.²⁷ Cable companies’ likely inability to offer SLAs appears to pose a major barrier to serving medium and large business customers over HFC networks.

Fourth, a review of the products advertised by Comcast in the Denver, Minneapolis, and Seattle MSAs and by Cox in the Phoenix MSA further reinforces the FCC’s prior conclusions that HFC-based services appear to be most suited (when they are actually upgraded and cover the relevant geographic area) to serving the smallest businesses and that fiber-based services are better suited to satisfying the demands of enterprise customers. Comcast’s highest speed HFC service provides service at 1 Mbps to 8 Mbps, while “[a]ctual speeds may vary and are not

²⁶ See Letter of John T. Nakahata, Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, at 9 (Nov. 14, 2006); *see also* Letter of John T. Nakahata, Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, at 26-30 (filed July 3, 2006) (“*GCI July 3 ex parte*”); Declaration of Dennis Hardman; attached to *GCI July 3 ex parte*; Declaration of Gene Strid, attached to *GCI July 3 ex parte*.

²⁷ As defined by Newton’s Telecom Dictionary, an SLA is “an agreement between a user and a service provider, defining the nature of the service provided and establishing a set of metrics . . . to be used to measure the level of service provided measured against the agreed level of service. . . . The SLA also typically establishes trouble-reporting procedures, escalation procedures, penalties for not meeting the level of service demanded— typically refunds to users.” NEWTON’S TELECOM DICTIONARY 739 (CMP Books 20th ed. 2004).

guaranteed.”²⁸ The terms and conditions of Comcast’s Business Cable Modem Service state that “Comcast makes no representation regarding the speed of the service other than the placement by Comcast of maximum speeds on Services ordered. Service speeds are approximate and maximum burstable speeds only. Speeds may vary and may be slower than Customer expects at times.”²⁹ By contrast, Comcast’s fiber-based Ethernet Service provides traffic prioritization between different applications as well as “99.97% network availability.”³⁰ Cox’s business class cable modem service for “small business” does not guarantee availability or bandwidth. A disclaimer on its website states: “Actual modem speeds vary. Number of users and network management needs may require Cox to modify upstream and/or downstream speeds. Cox cannot guarantee uninterrupted or error-free Internet service.”³¹ On the other hand, Cox’s “Optical Internet” fiber-based service offers speeds from T-1 to “Gigabit or higher.”³² And SLAs are available to guarantee packet-loss and latency. *Id.*

²⁸ See Comcast Corp., *Comcast Workplace, General Terms and Conditions*, Art. 2.2 (revised August 2007), available at <http://www.comcast.com/MediaLibrary/1/1/Shop/business/documents/WorkplacebundleTCs01Aug07.pdf> (last visited Aug. 31, 2007).

²⁹ See Comcast Corp., *Comcast Workplace, General Terms and Conditions*, Art. 2.2, (revised Aug. 10, 2006), available at <http://www.comcast.com/business/legal/Workplace%20Terms%20and%20Conditions%20081006%20FINAL.pdf> (last visited Aug. 31, 2007).

³⁰ See Comcast Corp., *Enterprise Network Service*, at <http://www.comcastcommercial.com/index.php?option=content&task=view&id=8&Itemid=37> (last visited Aug. 31, 2007).

³¹ See Cox Communications, Inc., *Cox Business Internet*, at <http://www.coxbusiness.com/products/data/businessinternet.html> (last visited Aug. 31, 2007).

³² See Cox Communications, Inc., *Cox Optical Internet*, at http://www.coxbusiness.com/pdfs/CBS60118_COI_DS-0806.pdf (last visited Aug. 31, 2007).

Fifth, to the extent that cable companies are providing DS-1 or DS-3 services, the available evidence indicates that they do so via traditional fiber loop facilities, not their HFC networks.³³ Because their fiber network architectures are similar to intramodal competitors' networks, cable companies likely face many of the same barriers when deploying such loops as intramodal competitors face.³⁴ Cable companies generally deploy their fiber transport networks in rings running through the densest portions of urban areas. From these fiber rings, they seek to deploy fiber laterals to individual end-user customers where the revenue opportunities compensate for the cost of construction. Moreover, laterals can only be connected to "splice points" on the transport network, which are generally located every 2,000 feet. *See TRRO* n.426. Based on these facts, it seems unlikely that a cable company would have the ability to deploy loops to a significantly larger percentage of the commercial buildings in the MSAs at issue than does TWTC.

Given the apparent limitations of HFC networks and the substantial barriers to fiber loop deployment, market analysts have indicated that cable companies have been slow even to attempt to serve medium and large businesses. Where they have begun to serve businesses, cable companies are focusing on serving only very small businesses. For example, one analyst has

³³ For example, in the *TRRO*, the Commission rejected Qwest's assertion that it had lost customers to "intermodal competition" from cable companies because "those losses are to the circuit-switched telephony service offered by Cox's competitive LEC affiliate [which relies on traditional fiber-based loops], rather than to its cable operation." *Id.* ¶ 193, n.514.

³⁴ *See TRRO* ¶ 95 (noting that fiber-based competition from cable companies is captured by the FCC's collocation-based impairment standard). Just like traditional wireline carriers, cable companies, "may collocate in order to access incumbent LEC loops, to interconnect with the incumbent LEC or other carriers, or to provide wholesale transmission services." *Id.* n.270.

indicated that, while “cable companies have recently announced their intention to aggressively enter the *Small Business* segment . . . AT&T has seen very limited activity and we do not expect a significant threat to come from the cable companies.”³⁵ Independent analysts agree that cable companies are generally not competing to provide service to medium and large business customers (those demanding DS-1 and DS-3 level services), “due to MSOs’ lack of national and international footprint, and the stringent requirements of enterprise telecommunications.”³⁶ Larger businesses “require service level agreements (SLAs), a broader array of services and a wider presence” than cable companies apparently provide today in most locations. *Id.*

While ILECs may claim in their pleadings to the FCC that cable companies are important competitors in the market for DS-1 and DS-3 services, their statements to analysts indicate otherwise. When asked by a Wall Street analyst whether BellSouth was “seeing competition in the small-, medium-sized enterprise space,” BellSouth CFO Pat Shannon responded, “Not any — I am sure that our guys see some of them. Some of the better players, like Cox and Time Warner, but [competition] has not risen to a level that I have seen any trends that I could share with you.”³⁷ In its fourth quarter 2006 earnings call, AT&T said this of Cox’s efforts in the business market:

³⁵ Lehman Brothers Equity Research, *AT&T: 3Q Reflects Improving Business Trends*, at 3 (Oct. 24, 2006) (emphasis added).

³⁶ Jim Duffy, *Cable Companies Intensify Enterprise Service Ambitions*, Network World, Oct. 24, 2006, available at <http://www.networkworld.com/news/2006/102406-cable.html?page=1> (last visited Aug. 31, 2007) (“Network World”).

³⁷ See BellSouth Corp., *BellSouth Q2 Earnings Conference Call Transcript (BLS)*, at 15 (July 24, 2006).

They are looking to migrate some of their consumer products predominantly and migrate that into some small business customers. I think their focus will be on the smaller customers, kind of ten lines and under probably four to six lines and under frankly, and when you look at that with respect to our business, that total is only at about the mid single-digits range of our total business. So, it's a sub-segment of the market we go after in small, medium business."³⁸

Analysts believe that, because of the impediments and barriers to fiber loop deployment, it will be difficult for cable companies to substantially penetrate the market for businesses that demand DS-1 and DS-3 services. To the extent that cable companies serve the business market, they will reportedly need to rely on other carriers' facilities, just as intramodal competitors do. Cable companies will need to "[s]titch[] together [networks] that reach through multiple providers" and this will require "multiple contractual arrangements."³⁹ Indeed, the head of Cox's business services division notes that Cox will be able to overcome its limited footprint only by interconnecting with other carriers. *Id.* Even if cable companies are able to deliver enterprise class services, they must overcome the apparent perception, carried over from their traditional HFC-based services, that their networks do not provide enterprise class reliability.⁴⁰

³⁸ See AT&T Corp., *AT&T Q4 Earnings Conference Call Transcript (T)*, at 7 (Jan. 25, 2007).

³⁹ Network World at 2.

⁴⁰ According to telecommunications and information technology consulting firm Ovum-RHK, "CIOs at large companies are less apt to trust their mission critical operations and network to cable companies which are relatively new entrants to the market and are not known for having networks with five nines of reliability . . . MSOs still have a long way to go to erase that perception and prove that they are every bit as capable as the big telcos." *Id.* (quoting Ovum-RHK's analyst Ken Twist).

2. Qwest Has Offered No Evidence Of Substantial Competition From Cable Companies In The Business Market In the Four MSAs At Issue.

It light of the foregoing, it is unsurprising that Qwest offers little evidence concerning intermodal competitors' ability or willingness to serve business customers in the four MSAs for which it seeks forbearance. For example, Qwest's claims that intermodal competitors such as cable operators serve as viable alternatives for small and medium enterprise ("SME") customers are entirely without support. Rather than providing specific evidence of cable companies' gains in retail business services market share in the four MSAs at issue, Qwest proffers information—the vast majority of which focuses on the *mass market*—taken, and sometimes distorted, from the companies' websites. *See, e.g.*, Brigham-Teitzel Minn. Dec. ¶¶ 13-17.

For example, in their declaration, Messrs. Brigham and Teitzel describe a map from Comcast's website which they claim "clearly shows" "Comcast's cable coverage" in the Minneapolis MSA. *Id.* ¶ 14. The map is actually a media coverage map that they concede in a footnote is "offered to potential advertisers as a representation of the geographic reach advertisers can expect when using the Comcast network to distribute advertising." *Id.* ¶ 14 & n.24. Nonetheless, without any explanation of their methodology, Messrs. Brigham and Teitzel deduce from "this Comcast media coverage map" that "the Comcast network serves Qwest wire centers that contain . . . approximately *** of Qwest's switched business lines in the Minneapolis-St. Paul MSA." *Id.* ¶ 14 & n.26. But the fact that an advertiser may reach a certain "number of cable households [*i.e.*, the mass market customers] in the Minneapolis-St. Paul Designated Market Area ('DMA')" is in no way indicative of the level of intermodal competition in the provision of DS-1 or DS-3-based business services in any of the wire centers in the

Minneapolis-St. Paul MSA. *Id.* n.24. Moreover, Qwest's assertion that Comcast's network "serves Qwest wire centers" is misleading, because Qwest does not say what geographic area or what types of customers Comcast serves in any particular wire center. Indeed, Comcast would arguably "serve" a Qwest wire center if it had only a few mass market customers in that wire center, but this level of network coverage is obviously insufficient to justify forbearance in any product market.

The other statements that Qwest offers in support of its claim that Comcast provides a viable alternative to Qwest in the retail market for business services are makeweight. The facts that Comcast management is "'thrilled'" to hire a new president of business services (*id.* ¶ 18) or that Comcast sees the enterprise market as "the next great business opportunity" (*e.g.*, Qwest Minn. Pet. at 23) are irrelevant. Neither statement offers any basis for concluding that Comcast has or will offer a viable, ubiquitous facilities-based alternative to Qwest in the SME market.

Qwest also fails to provide any specific evidence that Cox serves as a facilities-based alternative for SMEs in the Phoenix MSA. Qwest has no data, let alone any product market- or geographic market-specific data, on Cox's purportedly "very extensive" cable networks used to serve business customers.⁴¹ Nor does Qwest point to any detailed statistics regarding the number of business customers Cox serves using its own facilities in the wire centers in the Phoenix MSA. Rather, Qwest relies on the Commission's statements in the *Omaha Order* regarding Cox's "'strong success in the mass market'" and "'its current marketing efforts'" to business

⁴¹ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area, WC Dkt. No. 07-97, at 21 (filed Apr. 27, 2007) ("Qwest Phoenix Pet.").

customers in the *Omaha* MSA as evidence of the existence of competition from cable in the *Phoenix* MSA. In addition, Qwest's assertion that Cox "has established a separate marketing division" (*id.* at 22) to focus on SME customers is not indicative of any existing or potential success in serving this market in the *Phoenix* MSA. In addition, Qwest's reliance on Cox's success in winning a contract to serve the State of Arizona "to provide communications services to the *state government*" (*id.* at 23) (emphasis added) is immaterial to the question of whether Cox is serving as an alternative facilities-based provider in the *business* market. In fact, Qwest does not even indicate whether the types of services Cox will provide to the State of Arizona are the types of services for which Qwest seeks forbearance. Furthermore, notwithstanding the fact that Qwest cites nothing to support its claim that "Cox has over *** route miles of fiber in the *Phoenix* MSA" (*id.* at 22), as explained in Section III.B.2 *supra*, the mere presence of non-ILEC fiber is not evidence of competitive deployment of loops at DS-1 or DS-3 capacity or any other capacity for that matter.

In sum, cable companies still have significant barriers to overcome in serving the DS-1 and DS-3 market to any substantial degree. Even if they could overcome these barriers in some locations in several years' time with unforeseen technologies or unannounced network expansions, such developments are irrelevant as to whether cable companies are "willing and able" to serve enterprise customers today in the four MSAs within a "commercially reasonable time." *Omaha Order* ¶ 69. Finally, if cable companies do develop the ability to provide DS-1 or DS-3 circuits to businesses, the presence of a single facilities-based competitor would be insufficient to give Qwest "very strong market incentives" to offer DS-1 or DS-3 facilities to

competitors in the downstream retail market, as McLeodUSA's experience in Omaha demonstrates.

IV. THERE IS NO BASIS FOR A PREDICTIVE JUDGMENT THAT INTRAMODAL OR INTERMODAL COMPETITION WILL CONSTRAIN QWEST'S MARKET POWER OVER THE WHOLESALE INPUTS TO DS-0, DS-1, AND DS-3-BASED SERVICES.

If the Commission were to grant forbearance from Qwest's unbundling obligations in the four MSAs at issue, the consequences are predictable. As it has in Omaha, Qwest would raise its rivals' costs, placing them in a price squeeze that would substantially diminish or entirely eliminate competition in the business market.

A. The Commission's Prediction In The *Omaha Order* Has Proven To Be Incorrect.

In the *Omaha Order*, the Commission made a "predictive judgment" that, as a result of competition in the mass market from Cox, "Qwest will not react to our decision here [to relieve Qwest of unbundling obligations in certain wire centers] by curtailing wholesale access to its analog, DS0, DS1 or DS3-capacity facilities." *Id.* ¶ 79. But McLeodUSA's experience in Omaha demonstrates that the FCC's prediction was erroneous. Rather than offer reasonable wholesale pricing for DS-0, DS-1, and DS-3 loops, Qwest has only offered McLeodUSA access to its loop facilities at special access rates from its FCC Tariff No. 1.⁴² Unlike UNEs, which must be sold at cost-based rates, tariffed, special access services are largely unregulated. The

⁴² See Petition for Modification of McLeodUSA Telecommunications Services, Inc., *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Dkt. No. 04-223, at 4 (filed July 23, 2007) ("McLeodUSA Petition").

result is that Qwest is demanding substantially higher prices for DS-0 and DS-1 loops. As McLeodUSA summarizes,

Qwest has proposed only uneconomical, onerous, and non-negotiable offerings to replace the Section 251(c)(3) network elements for the affected wire centers [in the Omaha MSA]. Its demands include prices increases in the range of 30% or more for monthly charges for DS0 stand alone loops, a minimum increase of 86 percent for DS1 access loops, and a 360% increase in associated non-recurring charges for installing DS1 access loops. . . . Qwest's actions cannot be reconciled either with the Commission's confidence that market incentives would motivate it to meet its obligations to provide wholesale access to network elements pursuant to Section 271, or with the public interest standard articulated in Section 10(c).

Id. at i. Because it is not economical for McLeodUSA to use Qwest's post-forbearance offerings to provide DS-0 or DS-1-based services to business customers, McLeodUSA has publicly announced that it will discontinue its operations in the Omaha MSA if the Commission does not modify its *Omaha Order*.⁴³ Moreover, McLeodUSA has been unable to sell its facilities because potential buyers have been deterred by the "lack of reasonable wholesale pricing for last mile loop facilities." McLeodUSA Petition at 18.

As a direct result of McLeodUSA's difficulty in negotiating reasonable "commercial" pricing for voice-grade and high-capacity loops from Qwest, Integra abandoned its plans to enter the Omaha MSA.⁴⁴ As McLeodUSA explains,

⁴³ McLeodUSA Petition at 14 ("The nine affected wire centers represent the vast majority of revenue opportunity of McLeodUSA's current and prospective customer base. Accordingly, McLeodUSA is being forced to exit all Omaha wire centers because there is simply not enough revenue potential in the unaffected Omaha wire centers to justify the ongoing operating costs of the local switching center and related expenses.").

⁴⁴ *Id.* at 18 (citing Comments of Integra Telecom, Inc., *In re Petitions of the Verizon Tel. Cos. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Statistical Areas*, WC Dkt. No. 06-172, at 4-5 (filed Mar. 5, 2007)).

Integra found that it was “substantially less attractive economically to enter the Omaha market without access to unbundled network elements at TELRIC rates in the entire Omaha market” and decided that the investments it was prepared to make to provide service in Omaha would be better utilized in other markets. It emphasized . . . that it would be extremely difficult for a CLEC to provide service to small and medium business customers in competition with the ILEC if loops and transport were priced at special access rates.

Id.

Thus, the experience of CLECs in the Omaha MSA demonstrates that unbundling requirements are necessary in the absence of market-based incentives to ensure that Qwest does not engage in similar anticompetitive conduct in the Denver, Minneapolis, Phoenix, and Seattle MSAs.

B. If Qwest’s Forbearance Request Were Granted, Competitive Carriers Would Be Price Squeezed Out Of The Market For DS-0, DS-1, and DS-3-Based Services.

If Qwest’s instant forbearance request were granted, the experience of intramodal competitors in the four MSAs at issue will be no different from that of McLeodUSA and Integra in the Omaha MSA. The elimination of UNEs would leave Qwest’s wholesale customers, by virtue of Qwest’s control over essential local transmission facilities, no choice but to rely on loop and transport facilities as special access at significantly higher rates, resulting in a price squeeze.

Eschelon recently conducted studies of the likely financial impact of the elimination of UNEs on its business in the four MSAs at issue.⁴⁵ The studies examined the costs it incurs to provide services via DS-1 enhanced extended loops (“EELs”), stand-alone DS-1 loops and DS-0 loops in the Denver, Minneapolis, Phoenix, and Seattle MSAs and the changes to Eschelon’s operating margins in the event that Qwest’s forbearance request were granted. *Id.* The results of

⁴⁵ Declaration of William D. Markert On Behalf Of Eschelon Telecom, Inc. ¶ 3 (attached hereto as Attachment D) (“Markert Dec.”).

the studies were that for DS-1 EELs, Qwest's special access prices would increase Eschelon's costs to the point that its operating cash flow margin would be approximately **[proprietary begin]** **[proprietary end]** in each density zone of the MSAs at issue. *Id.* ¶ 6. According to William Markert, Eschelon's Executive Vice President of Network Financial Management, at that point, "financial institutions would not extend credit to Eschelon nor would potential investors invest in the company," and as a result, "Eschelon would be forced to exist the market for DS-1-based services in these four MSAs." *Id.* Mr. Markert also notes in his analysis that, without the constraining effect of the availability of UNEs, Qwest might increase its special access prices even further. *Id.* ¶ 7. Moreover, in addition to increasing the costs of wholesale inputs, Qwest may simultaneously decrease its retail prices. *Id.* According to Mr. Markert, Qwest has in fact already done so by offering a promotional retail rate of \$461.00 for a DS-1 EEL. *Id.* & n.2. The result of Qwest's exercise of its market power in this manner would be to impose a price squeeze on Eschelon, rendering it unable to make a profit and thereby forcing it to withdraw from the DS1-based services market. *Id.* ¶ 7. Mr. Markert's DS-0 loop cost study **[proprietary begin]** **[proprietary end]**. While the stand-alone DS-1 loop cost study **[proprietary begin]** **[proprietary end]**, the margins across all density zones in the four MSAs at issue were **[proprietary begin]** **[proprietary end]** *Id.* ¶ 8.

C. There Is Even Less Evidence To Support A Prediction That Cable Companies Would Expand Their Entry In The Business Market In The Four MSAs At Issue Than Was The Case In Omaha.

While the Commission's predictive judgment that Cox's presence in the Omaha MSA (along with other factors) would constrain Qwest's exercise of market power has proven to be patently wrong, there is even less support for the Commission to make a similar judgment with respect to competition in the Denver, Minneapolis, Phoenix, and Seattle MSAs. Comcast has made far less progress in entering the enterprise market in the MSAs in which it is the dominant cable provider (*i.e.*, Denver, Minneapolis, and Seattle) than Cox had made in Omaha. As Comcast explained in its opposition to Verizon's petitions for forbearance from unbundling obligations in six MSAs,⁴⁶ Verizon "clearly exaggerate[ed]" its market share loss to Comcast or other competitors. *Id.* at 3. There, Comcast stated unequivocally that "Verizon does not face competition from Comcast (or anyone else) in Boston, Philadelphia or Pittsburgh anything like Qwest faced in Omaha." *Id.* at 4.

The situation is no different in the four MSAs at issue here. According to the Commission's own data, as of June 2006, ILECs held an 81 percent market share in Colorado, and market shares of 77 percent and 86 percent, respectively, in Minnesota and Washington.⁴⁷ Thus, the competition faced by Qwest from Comcast and other non-ILEC providers in the Denver, Minneapolis, and Seattle MSAs is nowhere near the level of competition that the

⁴⁶ Comments of Comcast Corporation, *In re Petitions of Verizon Tel. Cos. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Dkt. No. 06-172 (filed Mar. 5, 2007).

⁴⁷ Industry Analysis & Technology Division, Wireline Competition Bureau, FCC, *Trends in Telephone Service*, Table 8.6 (Feb. 2007).

Commission apparently found in the Omaha MSA. Similarly, FCC data indicates that ILECs had a market share of 70 percent in Arizona. *Id.* In light of this evidence and in the absence of any material evidence to the contrary, there is no reason to believe Qwest's exaggerated claims that Cox "has already been successful in serving business customers in the [Phoenix] MSA." Qwest Phoenix Pet. at 23.

Furthermore, in light of the build-buy analysis conducted by TWTC discussed earlier, Qwest's reliance on the FCC's prediction in the *Omaha Order* that Cox would compensate for the limited reach of its network in the Omaha enterprise market by expanding it is misplaced. As explained, there are few commercial buildings to which TWTC could construct loop and transport facilities in the Denver, Minneapolis, Phoenix, and Seattle MSAs. The situation would be no different for Comcast or Cox in these MSAs. This is because, as discussed above, cable companies face many of the same entry barriers as TWTC and other intramodal competitors in this regard, thereby making it unlikely that cable operators will be able to expand the range of their networks in the business market to any significant extent for the purpose of providing DS-1 and individual DS-3-based services.

VII. CONCLUSION.

For the foregoing reasons, Qwest's petitions for forbearance should be denied.

Respectfully submitted,

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ATTACHMENT E

Mobile Wireless Service to “Cut the Cord” Households in FCC Analysis of Wireline Competition

Kent W Mikkelsen

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Verizon filed petitions in 2006 seeking forbearance from certain regulations, including dominant carrier regulation applicable to its mass market switched access services and unbundling regulations, in six geographic areas.¹ In its December 2007 decision to deny these petitions, the Commission used market share statistics that reflected both wireline voice customers and certain mobile wireless voice customers—those that subscribe only to mobile wireless voice service and have “cut the cord” to wireline voice service.² Specifically, the numerator used to calculate Verizon’s share included Verizon’s wireline voice customers and Verizon mobile wireless customers that have “cut the cord.” The denominator includes wireline customers of Verizon and competitors and all “cut the cord” customers.

It is my understanding that, in determining whether or not to forbear applying (1) dominant carrier economic regulation to mass market switched access services, and (2) unbundling regulations to DS-0, DS-1 and DS-3 loops and DS-1 and DS-3 interoffice transport facilities, the Commission evaluates, among other things, the degree of competition in providing wireline voice services to “mass market” customers.³ By including mobile wireless voice services in its calculation of market shares, the Commission appears to have concluded that mobile wireless voice services should be considered part of the wireline services market. Based

¹ *In re Petitions of the Verizon Telephone Companies for Forbearance to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd. 21293, ¶ 1 (rel. Dec. 5, 2007) (“*Verizon 6-MSA Order*”).

² *Id.* ¶¶ 27, 37 and Appendix B.

³ *See, e.g., id.* ¶ 37 (“We begin our analysis by examining competition in the retail and wholesale markets in the relevant MSAs. With respect to retail competition for mass market customers, Verizon’s MSA-wide mass market shares . . . taken in conjunction with other factors[] are not sufficient to warrant forbearance from dominant carrier regulation. Consistent with our precedent, we likewise are not persuaded that these data, in themselves, support the grant of forbearance from UNE obligations.”).

on the evidence I have reviewed, there is ample reason to doubt a market definition that includes mobile wireless services in the wireline services product market. If the relevant market includes only wireline services but not mobile wireless services, then including mobile wireless services in share calculations as the Commission has done does not accord with normal practices in assessing competition and tends to overstate the extent of competition.

Merger Guidelines approach to market definition

It is my understanding that the FCC assesses whether to grant a petition for forbearance from dominant carrier and unbundling regulations based in part on the extent to which the petitioner faces competition in the provision of the services for which it seeks forbearance. In order to undertake such an analysis, it is necessary to define the relevant product market. A considerable body of thought and experience in the assessment of competition has been developed in the context of antitrust analysis. The DOJ-FTC Merger Guidelines lay out a widely accepted method to define a “relevant market.”⁴ The purpose for defining a relevant market is to distinguish products or services that compete closely with one another from products or services that are less important to competition. The Commission has itself used the Merger Guidelines approach to define relevant markets.⁵

Following the Merger Guidelines approach, a relevant market is “a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products (‘monopolist’) likely would impose at least a ‘small but significant and nontransitory’ increase in price.”⁶ The Merger Guidelines also define the relevant market as the

⁴ U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, 57 F.R. 41552 (1992) (rev. Apr. 8, 1997) (“Merger Guidelines”).

⁵ See, e.g., *In re Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, ¶ 21 (rel. Nov. 17, 2005) (“*Verizon/MCI Merger Order*”); see also *In re Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd. 13967, ¶ 39 (rel. Aug. 8, 2005) (“*Sprint/Nextel Merger Order*”).

⁶ Merger Guidelines, §1.11.

narrowest set of products or services that meet the criteria.⁷ In practice, the Merger Guidelines method considers a narrow set of products or services and investigates whether that set of products or services meets the criteria to be a relevant market. If the criteria for a relevant market are not met, the Merger Guidelines approach broadens the set of products or services under consideration and investigates whether the criteria are met by the broader set. Once a set of products or services is identified that meets the relevant market criteria, the Merger Guidelines approach proceeds to analyze the structure (i.e., the number and relative size of suppliers) of the relevant market.

Applying the Merger Guidelines approach to wireline services

Applying this method to the question at hand, one begins by considering the narrowest potential market definition — whether wireline voice services provided to mass market customers constitute a relevant market.⁸ One asks whether, if there were only one firm providing wireline voice service to a specific geographic area now or in the future, it would be profitable for such a firm to raise prices by a small but significant amount (e.g., 5-10 percent) for a significant period of time (e.g., one year).

A critical part of the answer to this question depends on how current purchasers of wireline voice services would respond to such a price increase. This is easiest to see by considering the extremes. If no purchaser of wireline services would drop its service in response to such a price increase, it would clearly be profitable for the hypothetical monopolist to raise price. At the other extreme, if all purchasers of wireline services would drop their service in response to such a price increase, it would clearly not be profitable to raise price. Such extremes are almost never observed, however. It becomes an empirical question to determine the extent to

⁷ *Id.* § 1.0.

⁸ The Commission has concluded in other proceedings that wireline services should not be included in the relevant market for mobile wireless services. See e.g., *In re Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd. 21522, ¶ 239 (rel. Oct. 26, 2004) (“*AT&T/Cingular Merger Order*”). The issue discussed here—whether mobile wireless services should be included in the market for wireline services—though related, is different because the analysis starts by considering a hypothetical price increase for wireline services, not mobile wireless services.

which customers would decrease their purchases in response to such a price increase. It is also worth noting that growth or decline in the number of wireline voice customers for reasons other than a change in the price of wireline is not part of the market definition analysis.⁹

When the degree of price responsiveness has been determined, it is often useful to consider the variable profit margin¹⁰ that the hypothetical monopolist earns. Charging a higher price to customers that retain their service tends to increase profits, while giving up variable profits on customers that drop their service tends to decrease profits. Whether the hypothetical price increase is profitable overall—which in turn determines whether the set of products or services under consideration is a relevant product market—normally depends on the balance between these two factors.

Economists use the term “demand elasticity” to describe the extent to which customers will reduce their level of purchase in response to a change in price, holding other factors constant.¹¹ When the demand elasticity is known or can be estimated quantitatively, it has a direct role in determining whether or not the products or services under consideration are a relevant market. Very commonly, no suitable elasticity estimate is available, forcing analysts to rely on various indicators to guide a judgment about demand elasticity.

The most recent estimate of demand elasticity for wireline services in the U.S. of which I am aware is found in a 2003 paper by Rodini, Ward and Woroch.¹² The authors use data from 2000 and 2001 to estimate the demand elasticity for secondary fixed lines. They find that the

⁹ The market definition test is concerned with whether a hypothetical price increase would be unprofitable due to the loss of sales relative to the level of sales absent the price increase. If demand is shrinking or growing, this is adjusted for in assessing the level of sales that would be made absent the price increase.

¹⁰ Variable profit margin is usually defined as the difference between price and variable cost, expressed as a percentage of the price. Variable costs are those that increase or decrease with increases or decreases in the quantity of goods or services produced.

¹¹ Formally, demand elasticity can be expressed as the percentage change in quantity purchased associated with a 1 percent change in price.

¹² See Mark Rodini, Michael R. Ward and Glenn A. Woroch, “Going mobile: Substitutability between fixed and mobile access,” 27 *Telecommunications Policy* 457, 457-476 (2003).

demand for secondary fixed lines is relatively inelastic: -0.62 in 2001. In other words, an increase of 1 percent in the price of a secondary line would lead customers to decrease the number of such lines by only 0.62 percent. The authors also note that the demand for primary fixed lines is even more inelastic (i.e., the demand elasticity would be a smaller number in absolute value).¹³

Other authors have used the Rodini-Ward-Woroch demand elasticity estimate to answer the market definition question regarding wireline voice service.¹⁴ In this case, the determination is very easy. When the demand elasticity for a product is in the relatively inelastic range, an increase in price results in an increase in total revenues.¹⁵ Using the available estimate, a price increase of 1 percent is estimated to reduce the number of secondary (or primary) fixed lines by less than 1 percent, resulting in an increase in total revenues. Regardless of the variable profit margin, a price increase would be profitable. From this it follows that wireline service exhibiting the estimated demand elasticity is a relevant market.

A finding that wireline service is a separate relevant market without including mobile wireless service does not imply that there is no substitutability between wireline and mobile wireless services. It simply means that, in response to a small wireline price increase, purchasers of wireline service would not turn from wireline service to mobile wireless service in such great numbers that the wireline price increase would be unprofitable. In other words, one cannot rely on the presence of mobile wireless alternatives to constrain the price of wireline service. Rather, the price of wireline services is constrained principally by competition among firms supplying wireline service and by regulation.

¹³ Earlier studies have also found the demand for wireline service to be inelastic. As one paper put it, "Other work in this area generally supports [the] finding that the price elasticities for landline service approach zero in recent periods. . . ." Christopher Garbacz and Herbert G. Thompson, Jr., "Demand for telecommunications services in developing countries," 31 *Telecommunications Policy* 276, 278 (2007).

¹⁴ Phoenix Center for Advanced Legal and Economic Public Policy Studies, Policy Bulletin No. 10, "Fixed-Mobile 'Intermodal' Competition in Telecommunications: Fact or Fiction?" Mar. 31, 2004, <http://www.phoenix-center.org/pcpb.html>.

¹⁵ This can be verified in most basic economics textbooks. See, e.g., Paul A. Samuelson and William D. Nordhaus, *Economics* 72 (17th ed. 2001).

Shares within a relevant market

Once a relevant market has been defined, competition analysis normally proceeds to determine the shares of sales that each supplier makes (or, in some cases, could make) in the relevant market. Normal procedure does not include assigning a share to customers that choose not to purchase the product in the relevant market. In the case of wireline service, shares would be assigned to the ILEC, CLEC and cable providers based on their sales or the number of lines in service. Households with no wireline connection, such as those that had “cut the cord,” would not be included in the share calculation. Including households with no wireline connection would depart from standard economic practice and could overstate the amount of competition for wireline services.

Additional evidence regarding a wireline market

As noted above, determining the set of products or services that belongs in a well-defined relevant market rests on facts regarding demand elasticities and margins. In general, the greater the number of substitutes, and the closer or more similar those substitutes are to the products or services in question, the higher the demand elasticity will be. The demand elasticity for a product or service is not immutable, and can change over time. Given that Rodini-Ward-Woroch derived their demand elasticity estimate for wireline telephone service using data from 2000 and 2001, it is appropriate to consider whether secondary indicators offer evidence as to the extent to which demand elasticity for wireline telephone service has changed. Nonetheless, I am not aware of any analysis that shows that the demand for wireline service has become sufficiently elastic that wireline service (exclusive of wireless services) is no longer a relevant market.

Wireline and mobile wireless services are obviously similar in that they both offer voice communication. However, they also have numerous distinguishing characteristics. Wireline service typically provides high and consistent transmission quality, unlimited service for a flat rate, a common connection point for all members of a household, subscription costs that are generally lower than for mobile wireless service, and more accurate and reliable enhanced 911

emergency capability than mobile wireless service.¹⁶ Mobile wireless service can be used both at home or away, often limits the usage available without additional fees, typically costs more than wireline service, offers variable transmission quality, and is often limited by the battery life of a user's cell phone. Mobile wireless service can also combine text or Internet capabilities with conventional phone service.

Moreover, while the flat-rate pricing features familiar to wireline customers are increasingly available to mobile wireless users,¹⁷ and the practice of offering larger "buckets" of monthly minutes as part of a subscription package has made mobile wireless pricing structures more closely resemble the typical wireline pricing structure, prices for wireline and mobile wireless service still differ greatly. For example, AT&T offers a voice-only unlimited wireless calling plan for \$99.99 per month.¹⁸ By contrast, Verizon's unlimited local and long distance landline calling plan is only \$46.99 per month.¹⁹ Similarly, Verizon offers unlimited wireless local and long distance calling and mobile Internet for \$99.99 per month,²⁰ but Verizon's

¹⁶ Three-quarters of landline telephone users responding to a recent survey said that voice quality, reliability and consistency of service were greater with their landline home phone than with mobile wireless service. *See* <http://newscenter.verizon.com/press-releases/verizon/2008/new-survey-shows-83-percent-of.html> (last visited Apr. 3, 2008).

¹⁷ At least since 2000 and continuing into 2008, the Commission has pointed to the beginning and spread of unlimited local wireless calling plans. *See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Fifth Report, 15 FCC Rcd. 17660, 17668-69 (rel. Aug. 18, 2000), and Twelfth Report, 23 FCC Rcd. 2241, ¶ 113 (rel. Feb. 4, 2008).

¹⁸ *See, e.g.*, http://www.wireless.att.com/cell-phone-service/cell-phone-plans/individual-cell-phone-plans.jsp?WT.svl=calloaction&q_defaultPlanSkuId=sku1210020 (last visited Apr. 8, 2008) (describing AT&T's \$99.99 unlimited Individual Cell Phone Plan, which does not include any data features).

¹⁹ *See, e.g.*, <https://www2.verizon.com/Residential/Phone/Unlimited+Calling+Plans/Unlimited+Calling+Plans.htm> (last visited March 19, 2008); *see also* <http://promo.consumerfiber.com/FiOS-Bundle> (last visited Mar. 21, 2008) (advertising stand-alone retail price (i.e., prior to "Bundle Savings Discount") for "Verizon Freedom Essentials" unlimited calling plan as \$46.99).

²⁰ *See, e.g.*, <http://www.verizonwireless.com/b2c/splash/splash.jsp?v=7> (last visited Apr. 7, 2008) (describing Verizon's Unlimited Anytime Calling Basic Plan, including HTML browsing, but not data messaging, for \$99.99 per month).

unlimited local and long distance landline calling plan bundled with its basic DSL plan is only \$62.48.²¹

At some point in time, mobile wireless service may be a sufficiently close substitute for wireline service that it would serve as a competitive check on wireline prices. However, there is insufficient evidence to support this conclusion. I am not aware that anyone has demonstrated that the demand for wireline service is now so elastic that wireline service (exclusive of wireless service) is not a relevant market.

The evidence the Commission has cited to suggest that mobile wireless service competes with wireline service is largely dated or unpersuasive.²² For instance, the Commission found evidence that in 2005 Sprint planned significant efforts to induce wireline customers to “cut the cord” and expressed hope that the merger of Sprint and Nextel would promote mobile wireless competition with wireline services. This may have been a reasonable expectation in 2005. However, when the Commission makes decisions several years later judging whether mobile wireless belongs in the wireline market, it would now be reasonable to investigate whether the “nascent” intermodal competition the Commission found has materialized. I have been unable to find evidence that Sprint actually pursued the marketing plan the Commission referred to in 2005 or that targeting “cut the cord” customers has been a major Sprint business strategy in recent years, if ever.

The Commission cites as evidence of wireless-wireline competition the increasing percentage of the population that has “cut the cord.” This percentage, by itself, does not give much, if any, insight into the demand elasticity for wireline service. Certain types of consumers who have subscribed to both wireline and mobile wireless services find that the special features of wireline service are not of sufficient value to justify continuing with wireline service, given

²¹ See <http://www22.verizon.com/ForYourHome/NationalBundles/NatBundlesHome.aspx> (last visited Apr. 4, 2008) (offering Verizon “Freedom Essentials” unlimited local and long distance calling plan for \$46.99 per month and Verizon “High Speed Internet Starter Plan” with download speeds of up to 768 Kbps for an average of \$15.49 per month, for a total monthly price of \$62.48).

²² *Verizon/MCI Merger Order* ¶¶ 90-91; *Sprint/Nextel Merger Order* ¶¶ 141-143.

the price and quality of mobile wireless service available. For instance, the value of having a common connection point for all members of a household may be low or zero for single-person households or adults living with unrelated roommates.²³ Such a decision does not provide any additional information about the demand elasticity of consumers that continue to subscribe to wireline service. Yet it is the ability of mobile wireless to constrain the wireline prices charged to these remaining wireline consumers that is at issue in assessing wireline competition.

The Commission has noted that wireline carriers “consider” possible substitution between wireline services and mobile wireless services when making strategic plans regarding wireline services.²⁴ However, the Commission has not disclosed how or to what extent this factor enters the carriers’ strategy decisions. Such consideration may not provide any evidence regarding the degree of price sensitivity between wireline and mobile wireless service. For instance, strategic plans may note that the widespread adoption of mobile wireless service has decreased the minutes of local and long distance traffic over landlines and contributed to a decrease in the number of landlines in use. Such references provide no evidence that landline service providers are altering their prices or services to compete with mobile wireless services. Even if documents provide some evidence of competition, it may be limited to discussions of particular customer types that are most likely to “cut the cord.”

Similarly, Qwest’s petition for forbearance in Denver raises several arguments which shed little or no light on the product market for wireline services. First, Qwest points out that there are more wireless subscribers than wireline access lines in Colorado.²⁵ While it is likely true that consumers who have mobile wireless service would be more willing to drop wireline

²³ The National Center for Health Statistics 2006 survey found, “Nearly one-half of all adults living with unrelated roommates live in households with only wireless telephones (44.2 percent). This is the highest prevalence rate among the population subgroups examined.” See <http://www.cdc.gov/nchs/products/pubs/pubd/hestats/wireless2006/wireless2006.htm> (last visited Feb. 28, 2008).

²⁴ See, e.g., *Verizon/MCI Merger Order* ¶ 91; and *AT&T/Cingular Merger Order* ¶ 241.

²⁵ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area, Declaration of Robert H. Brigham and David L. Teitzel Regarding The Status Of Telecommunications Competition In The Denver, Colorado Metropolitan Statistical Area, WC Dkt. No. 07-97, ¶¶ 36-7 (filed Apr. 27, 2007).

service than those without, this observation conveys no information about the degree of willingness of wireline subscribers to drop wireline service in response to a price increase. After advancing the “cut the cord” argument discussed above, Qwest then states that consumers who have both wireline and mobile wireless services are decreasing wireline usage minutes while increasing mobile wireless service usage minutes. It is possible that some consumers are more willing to drop their landline service if they use it less, but one still cannot tell what the willingness level is and whether it is sufficiently high that mobile wireless service should be included in the relevant market with wireline service.

Suppose that the Commission is able through additional inquiry to gather sufficient evidence to conclude that mobile wireless voice service is part of the same relevant market as wireline voice service. The Commission must still be careful not to use such a finding to infer that mobile wireless voice service belongs in the same relevant product market with wireline services for services other than voice such as ADSL, DS1, and DS3 services. In evaluating whether to grant forbearance in unbundling DS-1 and DS-3 loops and DS-0 loops used to provide ADSL, the Commission considers competition in providing such loops. A comparison of Verizon’s wireless Internet and ADSL offerings is illustrative. Verizon’s mobile wireless Internet “BroadbandAccess Plan”²⁶ provides average download speeds of 600 Kbps to 1.4 Mbps, average upload speeds of 500 to 800 Kbps and a monthly data usage allowance of 5 GB for \$59.99 per month.²⁷ By contrast, one of Verizon’s residential DSL plans, its “High Speed Internet Service Power Plan,” offers faster download speeds of up to 3 Mbps, upload speeds of up to 768 Kbps and no data usage limits for only \$29.99 per month.²⁸ Just as with voice service, it is not clear that mobile wireless offers a competitive alternative to services such as ADSL, DS1, and DS3 services provided by wireline. Without defining relevant product markets with

²⁶ Verizon advertises its BroadbandAccess service as a way to “connect to the Internet, your company intranet or email” and to “enjoy the freedom and mobility to work where you need to without the hassles of Wi-Fi hotspots.” See <http://b2b.vzw.com/productsservices/wirelessinternet/> (last visited Apr. 7, 2008).

²⁷ See <http://www.verizonwireless.com/b2c/store/controller?item=planFirst&action=viewPlanDetail&sortOption=priceSort&catId=409&lid=//global/plans//wireless+internet+plan> (last visited Apr. 8, 2008).

²⁸ See <http://www22.verizon.com/content/consumerdsl/plans/all+plans/all+plans.htm> (last visited Apr. 8, 2008). This rate could increase after the first year.

respect to these services, the Commission cannot make a sound decision regarding what degree of competition exists in providing these services, and thus whether forbearance would harm consumers.²⁹

Conclusion

In evaluating petitions for forbearance, the Commission examines the state of competition for wireline services in a specific geographic area and at a specific point in time. The Commission appears to have little basis for determining that mobile wireless services are now part of the relevant market for wireline services. If circumstances change and if additional evidence is presented, it may be appropriate to make such a determination in the future. For now, however, well-accepted procedures for assessing competition would not calculate wireline shares by including mobile wireless-only customers that do not purchase wireline services because they have “cut the cord.”

²⁹ I understand that in its Anchorage forbearance order, the Commission explicitly declined to define relevant markets. See *In re Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd. 195, ¶ 12 (2007). It is sometimes possible to make competitive evaluations without defining a relevant market if one can make limiting statements such as “the relevant market is at least as broad as X.” Such statements should only be made when one has done sufficient analysis of the relevant product market to dispose of the competitive issue and it is not necessary to pursue the market definition exercise to its conclusion. Such statements would be based on, not offered as a substitute for, careful analysis of product substitution issues.